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Administrative Procedure

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ADMINISTRATIVE PROCEDURE

Notice of Rule Making

The Ohio Administrative Procedure Act purports to invalidate[1] any administrative rule, amendment or rescission of a rule which does not comply with the notice provisions of that statute. Because the Ohio Racing Commission gave notice of a proposed rule making which did not amount to a synopsis of the proposed rules, plaintiff claimed that the rules adopted pursuant to this notice were invalid. The reviewing court, in sustaining the validity of the rules, pointed out that the publication of a synopsis is only an alternative method under the Act, and if, as in this case, a general statement of the subject matter to which the proposed rule relates is set forth in the notice, that is deemed substantial compliance with the statute.[2] Furthermore, the court pointed out that a person who actually appeared at and participated in the hearing could not complain that the notice did not comply strictly with the statute.

The Ohio Administrative Procedure Act does not apply to rule making by municipal administrative bodies. Notice requirements, if any, must be found in specific legislation dealing with the particular matter involved. The Revised Code[3] requires that city boards of health, in promulgating their rules and regulations affecting the public at large, adopt and publish them in the same manner as municipal ordinances are adopted and published.[4]

These steps[5] in principle are as follows:

1. A reading of the text of the proposed rule on three different days;
2. A formal resolution embodying the text of the rule must be passed by a "yeas and nays" vote of the board;
3. Passage must be by an absolute majority of the membership of the board;

Substantive and Procedural Problems under Workmen's Compensation are dealt with under that title in the Survey. Attention should be directed at this point to the fact that the Ohio Administrative Procedure Act does not apply to the actions of the industrial commission under Sections 4123.01 to 4123.04 inclusive of the Revised Code. See OHIO REV. CODE § 119.01.

[1] OHIO REV. CODE § 119.02. The procedure for adoption, amendment, or rescission of rules is set forth in § 119.03.

[2] Standard "Tote," Inc. v. Ohio State Racing Commission, 121 N.E.2d 463 (Franklin Com. Pl. 1954).

[3] OHIO REV. CODE § 3709.20.

[4] Brunner v. Rhodes, 95 Ohio App. 259, 119 N.E.2d 105 (1953). A number of regulations were under attack; several were not sustained because of either a failure to comply with the enactment provisions or because of a lack of substantive authority.

4. The text of the rule must be published as in the manner of ordinances and becomes effective 10 days after the first publication;
5. If the rule is of an emergency nature, it may be given immediate effectiveness when passed by a two-thirds vote of the board membership, provided that the reasons for the emergency are set forth in a separate section of the rule.

Thus a regulation which recites the reasons for the emergency separately and which is passed by two-thirds of the board membership, is a proper emergency regulation effective immediately upon passage. One court has held a city board of health regulation to be a valid emergency measure, effective immediately, when approved by all but one of the board members, though it actually names an effective date more than a month later.[6]

Construction of Rules and Regulations

The presumptions and construction accorded administrative regulations by the courts are often decisive of their usefulness. This judicial attitude is presented through several cases dealing with the regulations of the Board of Liquor Control. In one case[7] the court concluded that it is implied from the act that no sales shall be made without a permit regularly issued, and that all permits are subject to the regulations of the board. The board had in practice interpreted the act as requiring a formal application to be acted upon by it in every case. The court followed this construction, pointing out that resort may be had to administrative construction by those executing and applying the laws, especially where a consistent position is taken over a considerable period of time.

In another case the court[8] had before it a board action denying a liquor permit in spite of vacancies within the applicant's district. The court reasoned that inasmuch as the rules of the board validly enacted and promulgated have the effect of statues, rules of construction applicable to statutes should apply. Thus the court is to give effect, if possible to all sections of the regulation and to avoid constructions which will render any part mean-

[5] Ohio Revised Code Section 731.17, and for emergency matters, Section 731.30. Under Section 731.20 an ordinary ordinance becomes effective not less than ten days after the first publication required by Section 731.21.

[6] Brunner v. Rhodes, 95 Ohio App. 259, 119 N.E.2d 105 (1953). Under Ohio Revised Code Section 3709.05, a city board of health normally consists of five members appointed by the chief executive. Approval of a regulation by all but one member means approval by four out of five, being more than the required two-thirds majority required for an emergency ordinance.

[7] Siegel v. Board of Liquor Control, 95 Ohio App. 377, 119 N.E.2d 659 (1953). It was held that the director did not exceed his authority in denying a permit by reason of Regulation No. 64 of Liquor Control Board.

[8] Kenwood Country Club v. Board of Liquor Control, 122 N.E.2d 425 (Franklin Com. Pl. 1953).

ingless or inoperative. Furthermore, regulations and sections of several different regulations in pari materia are to be construed together. Thus, taking Regulation No. 64 and No. 11 of the Board of Liquor Control together, there is no clear intention to limit permits in a subdivision to a number less than those issued and outstanding.

Authority for the Enactment of Rules

Basic to the consideration of the authority to enact rules and regulations is the existence of statutory authority vested in any administrative body created by statute. The statutory authority is the source of rule-making and also determines its scope; unless it can reasonably be found in the statute, the agency does not possess rule-making authority.[9] However, the rules validly enacted and properly promulgated by an agency have the effect of statutes.[10]

When the discretion vested in a board is to be exercised relative to the establishment of rules and regulations within the police power for the protection of health, safety, or general welfare, and it is impossible or impracticable to provide legislative standards, the adoption of such rules and regulations is not an exercise of legislative power. This principle has been held especially applicable to the regulation of horse racing and legalized wagering thereon; it is a field where potential evils abound and the General Assembly cannot be expected to anticipate the complex problems of regulation. In the case of racing this rule-making power extends to regulations covering both the running of the horses and pari-mutuel wagering. The fact that the regulations of the state racing commission go beyond the statutory restriction is unimportant as long as those rules are consistent with and do not subvert the statute.[11] Also a regulation of the Department of Liquor Control was sustained, despite its reference to specific conduct which was in excess of anything mentioned in the authorizing statute.[12]

The adoption of regulations under an enabling statute is a matter of discretion with the administrative agency. A court will not interfere with the discretion of the agency in determining whether new regulations are necessary.[13] Before a court will intervene, it must be clearly shown that the

[9] Ellis v. Ohio Turnpike Commission, 162 Ohio St. 86, 120 N.E.2d 719 (1954).

[10] Kenwood Country Club v. Board of Liquor Control, 122 N.E.2d 425 (Franklin Com. Pl. 1953).

[11] Standard "Tote," Inc. v. Ohio State Racing Commission, 121 N.E.2d 463 (Franklin Com. Pl. 1954).

[12] American Wine & Beverage Co., Inc. v. Board of Liquor Control, 116 N.E.2d 220 (Ohio App. 1951).

[13] Pepperidge Farm, Inc. v. Foust, 117 N.E.2d 724 (Franklin Com. Pl. 1953). The plaintiff was seeking to compel the Director of Agriculture to issue regulations under

agency is acting on a clearly erroneous interpretation of the law, and all doubts will be resolved in favor of the correctness of the construction of the law by the officer charged with enforcement.

An administrative agency may not, however, impose a penalty where neither the constitution of the state nor any legislation imposes one. Thus, it was held erroneous for the Board of Liquor Control to suspend a permit for violation of Rule No. 53 prohibiting any licensee from possessing upon the premises any tickets which may or can be used for gaming or wagering, or allowing or conducting gaming or wagering or any game of chance or skill.[14]

Jurisdiction

Several cases presented problems in the area of administrative jurisdiction. One decision was concerned with an internal jurisdictional problem of the Department of Liquor Control.[15] The members of the Board of Liquor Control were cited for contempt of the court of common pleas for failure to obey a court order requiring them to order the Director of Liquor Control to renew a liquor permit. It was determined that they were not in contempt because the order directed them to take action beyond their lawful authority. Under the statutory adminstrative set-up in the Department of Liquor Control, applications for renewal of permits must be made to the Director of the Department, and the Board does not act except on appeal.

It was also argued in this case that the court of common pleas had jurisdiction under the Administrative Procedure Act[16] to enter whatever order the director should have made under the circumstances. However, the appellate court held that the director was without power to renew a permit at an undesignated place, to be held in escrow, and likewise the court of common pleas in reviewing his action was powerless to order a renewal.

Ohio Revised Code Section 911.18 despite his apparent determination that rules and regulations were unnecessary in the enforcement of the section.

[14] Dayton Gymnastic Club v. Board of Liquor Control, 112 N.E.2d 569 (Franklin Com. Pl. 1953). This court relied upon a prior decision of the court of appeals, *Columbus v. Barr,* 111 N.E.2d 593 (Ohio App. 1953) which had held that the carrying on of keno (bingo) in all of its constituent parts is not a criminal offense unless it is carried on for profit, striking down a municipal ordinance as in conflict with General Code Section 13064 because it omitted the words "for his own profit" which the state statute includes. OHIO REV. CODE § 2915.12.

In the principal case the proceeds from the "bingo" operations were used in the Club's pet charitable project, affording aid to under-privileged children.

[15] Socotch v. Krebs, 97 Ohio App. 8, 119 N.E.2d 309 (1954).

[16] Ohio Revised Code Section 119.12 provides that the court of common pleas, on appeal, may revise, vacate or modify the order or make such of its ruling final as is supported by reliable, probative, and substantial evidence and is in accordance with law.

Another decision[17] presents a good example of the primary exclusive jurisdiction of an administrative agency, holding that all issues concerning the construction, validity or constitutionality of the the orders and regulations of the Public Utilities Commission of Ohio must be submitted to that body first, and that a court of general jurisdiction has no jurisdiction whatever under the Ohio statutes to determine the validity of its orders or entertain injunction suits to restrain a utility from shutting off a gas supply pursuant to an order of the Public Utilities Commission. The only court in the state which may hear such a controversy is the supreme court.[18]

In another decision the supreme court[19] held that the Public Utilities Commission has continuing jurisdiction over its orders and may amend any order it makes, and where the Commission is considering the validity of a rate as to a single commodity, it has discretion in the fixing of such a rate to base it upon matters other than the valuation of the property of the railroad and the actual cost of operation.

The Hearing Before the Administrative Agency

1. Parties

The Administrative Procedure Act[20] requires the agency to give notice to the "party" informing him of his right to a hearing. Party[21] is defined to mean and include the persons whose interests are the subject of an adjudication by an agency.

A receiver of the property of a permit holder is not a "party" within the meaning of the Administrative Procedure Act.[22] The liquor permit is not a property right nor a contract; the most that it constitutes is a mere permission to engage in the liquor business, and the receiver has no interest in a revocation proceeding regarding it.

2. Burden of Proof

While the Ohio Administrative Procedure Act is silent on the matter, a court of appeals has stated that it is implicit in the Act that a party asserting the affirmative of an issue bears the burden of proof in an adjudicative proceeding. Thus the Department of Industrial Relations in ordering

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[17] Pottorf v. East Ohio Gas Co., 96 Ohio App. 457, 122 N.E.2d 416 (1948).

[18] OHIO REV. CODE §§ 4903.12 and 4903.13.

[19] Toledo Edison Co. v. Public Utilities Commission, 161 Ohio St. 221, 118 N.E.2d 531 (1954).

[20] OHIO REV. CODE § 119.07. The giving of notice is not required where hearing will be had only on request of a party.

[21] OHIO REV. CODE § 119.01 (G).

[22] Meyer v. Board of Liquor Control, 119 N.E.2d 156 (Franklin Com. Pl. 1954).

changes and the adoption of new types of construction has the affirmative of the issue, with the right to open and close with evidence and argument. The director of the department could not shift this burden to the respondent by the issuance of a "show cause" order, since such a procedure is not authorized by the Ohio statutes and cannot be legally used in the absence of express statutory authorization.[23] The court, in holding that the hearing denied due process of law, relied heavily upon an analoguous situation under the Federal Administrative Procedure Act[24] and on federal judicial authority.[25]

In considering whether the burden of proof has been sustained the administrative agency is the trier of the facts and must be the sole judge of the credibility of witnesses. The agency has the duty to determine what witnesses are to be believed, which are the most worthy of belief, and to draw from the credible testimony reasonable inferences.[26] However, on appeal, despite this duty of being the sole judge of the credibility of the witnesses, the reviewing court has a duty to find that the order of the agency is supported by reliable, probative and substantial evidence upon the consideration of the entire record.[27]

Judicial Review — Parties to An Appeal

The supreme court reaffirmed its previous position[28] that it was not the intention of the legislature in enacting the Administrative Procedure Act to give a right of appeal to the administrative agency from an adverse ruling of a court of common pleas on its decisions, and sustained a motion to dismiss the appeal of the director of education and the high school board from a judgment of the court of common pleas rendered on appeal from an order of the Department of Education.[29] The agency must find express

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[23] Goodyear Synthetic Rubber Corp. v. Department of Industrial Relations, 122 N.E.2d 503 (Franklin Com. Pl. 1954).

[24] 5 USCA § 1006 (c), providing generally that the proponent of a rule or order shall have the burden of proof.

[25] Philadelphia Co. v. Securities and Exchange Commission, 175 F.2d 808 (D.C. Cir. 1948); judgment vacated with directions to dismiss the petition for review as moot, on joint motion of counsel for the parties. Securities & Exchange Commission v. Philadelphia Co., 337 U.S. 901, 69 Sup. Ct. 1047 (1949).

[26] American Wine & Beverage Co. v. Board of Liquor Control, 119 N.E.2d 220 (Ohio App. 1951).

[27] American Legion Clifton Post No. 421 v. Board of Liquor Control, 122 N.E.2d 420 (Franklin Com. Pl. 1954).

[28] Corn v. Board of Liquor Control, 160 Ohio St. 9, 113 N.E.2d 360 (1953). See 5 WEST. RES. L. REV. 227, 229 (1954).

[29] *In re* Millcreek Local District High School, 160 Ohio St. 234, 115 N.E.2d 840 (1953); *In re* Roundhead Local District High School, 160 Ohio St. 240, 115 N.E.2d 841 (1953).

statutory authority to file an appeal. However, express authorization to appeal is not jurisdictional, and where an agency in fact appeals, there being no objection to its prosecution, and the appeal is heard and judgment rendered, the judgment is valid and cannot be attacked on jurisdictional grounds. It was held that an appeal by the Board of Liquor Control from an adverse decision in the court of common pleas presented subject matter over which the court of appeals had jurisdiction, and since the appellants proceeded in such manner as to constitute approval of the appeal, they waived their right to raise the question of jurisdiction over the parties after judgment.[30]

Time for Appeal

In the absence of a specific date applicable to the agency by special statutory provision, the Ohio Administrative Procedure Act requires that notice of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order. This was held jurisdictional in an appeal from a decision of the Board of Liquor Control.[31]

Scope of Review

Sometimes a question arises whether an appeal presents a moot question and should be dismissed without any decision on the merits. Such a situation arose in connection with an application for the renewal of a permit filed with the Department of Liquor Control. The department had denied renewal because of lack of suitable premises, and the Board of Liquor control had on appeal dismissed that action because there was now no permit in existence and therefore the matter was moot. The court of appeals reversed an affirmance by the court of common pleas, holding that the matter was not moot because the rights of the appellant became fixed as of the date of the appeal from the department to the board, and had the appeal been favorably acted upon there would have been some time left in which to attempt to take measures to procure a proper establishment, stating that a question only becomes moot when it is purely academic or abstract and any judgment whatever which might be rendered thereon would in no way avail or be beneficial to any of the parties.[32]

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[30] Mantho v. Board of Liquor Control, 162 Ohio St. 37, 120 N.E.2d 730 (1954).

[31] Hart v. Board of Liquor Control, 96 Ohio App. 128, 121 N.E.2d 257 (1953). The mistake of the appellant was in waiting until a decision on his motion for a rehearing before the administrative agency. His notice of appeal was filed within fifteen days from notice of the decision on rehearing but more than fifteen days after the mailing of the notice of the agency's decision on the original hearing.

[32] Artists & Writers Ass'n v. State Department of Liquor Control, 96 Ohio App. 121, 121 N.E.2d 263 (1953).

The Administrative Procedure Act[33] authorizes an appellate court to take additional evidence when it is newly discovered and could not reasonably have been obtained prior to the agency hearing. This section of the statute is not, however, invoked by a motion to complete the record. Also for the success of such a motion a proper foundation must be laid by making a demand on the agency for the completion of the record.[34] Normally, the hearing of the appeal is confined to the record as certified to it by the agency.[35]

The Administrative Procedure Act does not contemplate a de novo trial of the matter which was before the agency but only a review of its action. The court cannot substitute its judgment for that of the administrative agency.[36]

As a result of the hearing on appeal the court may affirm the order of the agency if it finds, from a consideration of the entire record and such additional evidence as may have been admitted before it by special order, that the agency action is supported by reliable, probative and substantial evidence and is in accordance with law.[37] Several cases reviewing the decisions of the Board of Liquor Control afford practical applications of the function of the reviewing court.[38]

If, on the other hand, the reviewing court does not find the required statutory support for the order, it may either reverse, vacate, or modify the order or make such appropriate ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.[39] An examination of the reversals of the Board of Liquor Control reported during the period covered by this study shows that the main ground for failure to sustain the

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[33] OHIO REV. CODE § 119.12.

[34] Vito v. Board of Liquor Control, 122 N.E.2d 121 (Franklin Com. Pl. 1953).

[35] OHIO REV. CODE § 119.12.

[36] Napolet v. Board of Liquor Control, 119 N.E.2d 93 (Ohio App. 1953); Hermelin v. Board of Liquor Control, 120 N.E.2d 471 (Ohio App. 1953).

[37] OHIO REV. CODE § 119.12. Fawcett v. Board of Liquor Control, 118 N.E.2d 697 (Franklin Com. Pl. 1953).

[38] Department of Liquor Control v. Sassler, 120 N.E.2d 332 (Ohio App. 1951); State Board of Liquor Control v. Jackson, 120 N.E.2d 329 (Ohio App. 1951); A.E.F. Veterans Ass'n, 37th Division v. Board of Liquor Control, 94 Ohio App. 550, 116 N.E.2d 750 (1950); State v. Sassler, 121 N.E.2d 116 (Franklin Com. Pl. 1951); Henderson v. Rutkowski, 121 N.E.2d 665 (Franklin Com. Pl. 1954); Rio Bar, Inc. v. State, 117 N.E.2d 522 (Franklin Com. Pl. 1954); *In re* Sons Bars & Grills Co., 117 N.E.2d 526 (Franklin Com. Pl. 1954); Mozingo v. Board of Liquor Control, 118 N.E.2d 926 (Franklin Com. Pl. 1954); Cavalier v. Board of Liquor Control, 119 N.E.2d 131 Franklin Com. Pl. 1954); Mastroianni v. Board of Liquor Control, 119 N.E.2d 140 (Franklin Com. Pl. 1954); Morton v. Board of Liquor Control, 119 N.E.2d 140 (Franklin Com. Pl. 1954).

[39] OHIO REV. CODE § 119.12.

board's action was lack of sufficient evidence in the record.[40] These cases also show that the reviewing court simply reverses the board more often than it undertakes to issue the order which the evidence and the law require.

Rehearing

Authority for rehearing by the reviewing court is not predicated on the Administrative Procedure Act. The office of such a motion is to direct the court's attention to matters of fact or law that have not been given attention, and it is not for the purpose of reargument of the appeal on the entire record. No oral argument is permitted on application for rehearing of the appeal.[41] The court has, however, given attention to a brief filed in support of the rehearing and has reexamined its original decision during the process of decision on the motion for rehearing.[42]

Review Outside the Administrative Procedure Act

The Ohio act does not apply to certain important agencies such as the Public Utilities Commission, the superintendent of banks, superintendent of building and loan associations, and the superintendent of insurance.[43] While it does apply to some of the functions of the department of taxation, the appeals section of the Ohio act specifically excepts the department of taxation (Board of Tax Appeals) from its provisions.[44] Therefore judicial

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[40] State v. Slaughter, 122 N.E.2d 487 (Ohio App. 1953); Smith v. Board of Liquor Control, 96 Ohio App. 396, 121 N.E.2d 920 (1954); Cannon's Estate v. Board of Liquor Control, 120 N.E.2d 478 (Franklin Com. Pl. 1953); Mallett v. Board of Liquor Control, 121 N.E.2d 139 (Franklin Com. Pl. 1953); Chudde v. Board of Liquor Control, 117 N.E.2d 60 (Franklin Com. Pl. 1953); Ashford v. Board of Liquor Control, 121 N.E.2d 164 (Franklin Com. Pl. 1954); Chateau Cafe v. Department of Liquor Control, 119 N.E.2d 137 (Franklin Com. Pl. 1954); Brewer v. Board of Liquor Control, 116 N.E.2d 465 (Franklin Com. Pl. 1953). The case of *Page v. Board of Liquor Control,* 121 N.E.2d 125 (Ohio App. 1954), reversed the order of the board, but on an interpretation of the agency's own regulations. A regulation of the board provided that applications pending 45 days or more are deemed to have been rejected. Reading this regulation with others in pari materia it was decided that only valid applications not previously rejected by action of the department or by operation of law, are to be processed in the order in which they are filed. The board was therefore directed to receive and process applications for new permits which are filed and pending with it, in accordance with law.

[41] Weintraub v. Board of Liquor Control, 122 N.E.2d 511 (Franklin Com. Pl. 1953).

[42] Leganshuk v. Department of Liquor Control, 120 N.E.2d 333 (Franklin Com. Pl. 1953).

[43] OHIO REV. CODE § 119.01 (A).

[44] OHIO REV. CODE § 119.12. Ohio Revised Code Section 5703.01 refers to the Department of Taxation as being composed of the Tax Commissioner and the Board of Tax Appeals.

review of these agencies, if any, must be procured through the specific statutes applicable to them.

Statutes provide for a review of the Public Utilities Commission and the Board of Tax Appeals by the supreme court. As a matter of procedure, the statute requires that the appellant must set forth his grounds of objection to the utilities commission's order in his application for rehearing before that body.[45] In the *City of Marion* case[46] the supreme court dismissed a portion of an appeal because the assignment of error before the commission was too general to constitute compliance with the statutory basis for appeal. Also the Public Utilities Commission is required by statute[47] in every contested case to file a written opinion setting forth the reasons justifying the decision arrived at by the Commission, together with a resume from the record of the facts upon which its decision is based. The supreme court held[48] that a formal finding of facts by the Commission which adopted the report of its secretary, which report in turn contained the accounting reports of the Commission auditors and the reports of the Commission engineers, was sufficient compliance with the statute.

Appeals from the Board of Tax Appeal go directly to the supreme court. That court has held that in reviewing the board where it has held a de novo hearing and has made a finding of fact, it will not disturb the findings of the board unless the particular determination is unreasonable.[49]

Effect of Adoption of Revised Code On Administrative Regulations Issued Pursuant to the General Code

A licensee whose liquor permit had been revoked for alleged violation of a liquor department regulation promulgated under the General Code charged that the regulations had not been re-promulgated under the Revised Code and were therefore void at the time of his hearing which was after October 1, 1953, the effective date of the Revised Code. The reviewing court,[50] relying heavily upon Revised Code Section 1.01 which saves rights and liabilities generally that have accrued or been incurred under the General Code prior to the effective date of the Revised Code and continues the

[45] OHIO REV. CODE § 4903.10.

[46] Marion v. Public Utilities Commission, 161 Ohio St. 276, 119 N.E.2d 67 (1954).

[47] OHIO REV. CODE § 4903.09.

[48] Buckeye Lake Chamber of Commerce v. Public Utilities Commission, 161 Ohio St. 306, 119 N.E.2d 51 (1954).

[49] Montgomery County v. Budget Commission of Montgomery County, 160 Ohio St. 263, 116 N.E.2d 1 (1953). The statute providing for appeal from the Board of Tax Appeals to the Supreme Court is Revised Code Section 5717.04.

[50] Meyer v. Board of Liquor Control, 119 N.E.2d 156 (Franklin Com. Pl. 1954).