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CONSTITUTIONAL LAW - SEPARATION OF POWERS - VALIDITY OF STATUTE REQUIRING REFERENCE OF DISPUTES TO COMMISSIONER OF LABOR

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CONSTITUTIONAL LAW — SEPARATION OF POWERS — VALIDITY OF STATUTE REQUIRING REFERENCE OF DISPUTES TO COMMISSIONER OF LABOR — The plaintiff was conducting a private employment agency under a license issued by the commissioner of labor. The defendant, a movie actress, secured an engagement through the plaintiff's influence, pursuant to a contract. A dispute arose as to the amount of compensation due the plaintiff under the terms of the contract. A statute required reference of such disputes to the commissioner of labor, who was to hear and determine the same. Within ten days a dissatisfied party could appeal to the superior court and have a hearing *de novo*.¹ The plaintiff, failing to comply with the statute, commenced the action in the superior court. The defendant claimed that the action was prematurely brought since the dispute had not been referred to the commissioner of labor. The plaintiff contended that the act in that requirement was unconstitutional. The court *held*: (1) that the suit was prematurely brought since it was not in compliance with the statute; (2) that the statute was constitutional since employment agencies are within the police power of the state to regulate; and, (3) that the statute did not provide an unconstitutional delegation of judicial power to the administrative official. *Collier & Wallis, Ltd. v. Astor*, (Cal. 1937) 70 P. (2d) 171.

Flagrant abuses arising out of the operations of the business of private employment agencies have been manifest for many years.² Because such practices

¹ Cal. Gen. Laws (Deering, 1931), Act 2349, § 19.

² The results of the earlier investigations of the abuses of private employment agencies are summarized by Justice Brandeis in his dissenting opinion in *Adams v. Tanner*, 244 U. S. 590 at 597, 37 S. Ct. 662 (1917), wherein he states that such agencies were guilty of charging fees but failing to make an effort to find work for the applicant; sending applicants to places where either no work existed, or, where the

are harmful to the public welfare it has become definitely established that employment agencies are subject to regulation by the state in the exercise of the police power.³ A more difficult problem is presented as to whether the requirement, that disputes arising under the Private Employment Agency Act be first submitted to the commissioner of labor for arbitration, is an unconstitutional delegation of judicial power to an administrative official. The federal constitutional restriction of the exercise of judicial functions by administrative bodies does not apply to the states.⁴ However, state constitutions do prohibit such delegation of powers, either by a clause which expressly separates the powers of the government,⁵ or which impliedly does so by definition of the powers to be exercised by the three branches of the government.⁶ The recent tendency has been towards liberalizing the doctrine of delegation of powers and granting to administrative tribunals some powers which are judicial in nature because of the more expeditious handling of the matters by such administrative tribunals.⁷

work to be found was unsatisfactory but the applicant not having the price of return ticket, was forced to take what work there was; charging of exorbitant fees; inducing workers to leave their present positions for "better jobs"; and, collusive fee splitting between agency and employer. This latter evil has been characterized as the "three gang system." 38 YALE L. J. 225 at 228 (1928). One gang, just discharged, is on its way home; the second is momentarily employed; the third is on its way to be hired. The more recent abuses are discussed by Justice Stone in his dissenting opinion in *Ribnik v. McBride*, 277 U. S. 350 at 359, 48 S. Ct. 545 (1928).

³ The first case in the United States Supreme Court on the subject was that of *Brazee v. Michigan*, 241 U. S. 340, 36 S. Ct. 561 (1916), where it was held that a state, in the exercise of its police power, could require licenses of and subject to regulation, private employment agencies. This has been followed by a long line of decisions. See note in 56 A. L. R. 1340 (1928); 34 MICH. L. REV. 285 (1935). The case of *Ribnik v. McBride*, 277 U. S. 350, 48 S. Ct. 545 (1928), while holding that a state has power to require a license and to regulate the business of an employment agency, put a damper on such regulation by also holding that, since the business was not "affected with the public interest" the state had no power to fix charges to be made for the services rendered. However, since the decision in *Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505 (1934), which overthrew the categorical test of "business affected with the public interest," it is unlikely that the decision of *Ribnik v. McBride* will be adhered to.

⁴ *Reetz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390 (1903); *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 S. Ct. 178 (1908).

⁵ For example, Cal. Const. (1879), art. III, § 1: "The powers of the government of the state of California shall be divided into three separate departments—the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted."

⁶ Mich. Const. (1908), art. IV, § 1.

⁷ One of the earliest manifestations of this liberal tendency is found in the case of *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911). See the discussion in STASON, CASES AND MATERIALS ON ADMINISTRATIVE TRIBUNALS 65, note 5 (1937), where the author says, "Logically our constitutional system should prevent the conferring of judicial powers upon administrative officers, but logic retreats in the face of necessity." Some courts simply say the function is quasi-judicial and justify them-

But, obviously, in view of the constitutional restrictions, there can be no such delegation of strictly judicial powers merely on the ground that public policy deems it expedient.⁸ Certain methods of approach have, therefore, been evolved by the courts by which they determine whether the authority conferred is in fact an unconstitutional delegation of judicial power. The character of the issues to be decided by the tribunal is important in determining whether judicial power has been validly conferred.⁹ The settlement of controversies between individuals may be said to be the essence of a judicial issue.¹⁰ Where, however, such decision involves intricate facts within the knowledge of the administrative board and not of ordinary nature, the courts are more apt to require prior resort to the administrative board to determine them.¹¹ It has frequently been baldly stated that administrative agencies may be endowed with functions of a judicial nature provided the exercise of such functions is "incidental" to the exercise of their administrative functions.¹² But no rule of thumb for determining when such functions are "incidental" has been devised. The difficulty in formulating such a rule may be illustrated by an attempt to ascertain whether the commissioner of labor, under the statute in the instant case, when arbitrating disputes under the act is exercising this function incidentally to other duties of investigating applicants for licenses, collecting annual fees from licensees, inspecting records of licensees, and prescribing regulations for the operation of the act. Where the administrative official merely passes on facts, he is usually not considered to be exercising a judicial function.¹³ The reason usually given is that, since it is but a finding of fact and sometimes an additional automatic application of law thereto, the act of the administrative official lacks discretionary quality and hence is merely ministerial rather than judicial. If the statute provides that the parties may elect to come under it or not, since the administrative

selves with reference to similar functions performed without challenge by other administrative agencies. *Alabama's Freight Co. v. Hunt*, 29 Ariz. 419, 242 P. 658 (1926); *Ex parte Lewis*, 328 Mo. 843, 42 S. W. (2d) 21 (1931); *Borgnis v. Falk Co.*, *supra*.

⁸ In re Opinion of the Justices, 87 N. H. 492, 179 A. 357 (1935).

⁹ Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 (1935). The author divides the character of the issues into six classes for the purpose of determining when an administrative body has been conferred with unconstitutional judicial powers.

¹⁰ *Norfolk & W. Ry. v. Commonwealth*, 143 Va. 106, 129 S. E. 324 (1925); In re Opinion of the Justices, 87 N. H. 492, 179 A. 357 (1935).

¹¹ This point is made by Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 at 295 (1935). See also, *Texas & Pacific Ry. v. Abilene Cotton Oils Co.*, 204 U. S. 426, 27 S. Ct. 350 (1907); *Fletcher*, "Power of the Interstate Commerce Commission to Award Damages," 25 YALE L. J. 489 at 491 (1916).

¹² 3 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES*, 2d ed., 1654 (1929); *State v. Public Service Comm.*, 94 Wash. 274, 162 P. 523 (1917); *People ex rel. Rice v. Wilson Oil Co.*, 364 Ill. 406, 4 N. E. (2d) 877 (1936).

¹³ *State v. Conragan*, (R. I. 1937) 192 A. 752; *State v. Grace*, 184 La. 443, 166 So. 133 (1936); *Jennings v. Sawyer*, (S. C. 1937) 189 S. E. 746 at 749; *Russell v. City of Fargo*, 28 N. D. 300 at 316, 148 N. W. 610 (1914).

tribunal then acts as a board of arbitration by agreement, it is not considered an invalid delegation of judicial power.¹⁴ Where the administrative proceedings closely approximate those of the courts of law, some courts have held that the administrative agency is then exercising a judicial function;¹⁵ but where the proceedings lack some of the features usually attributable to the courts, others have held, that, for that reason, the function is not judicial.¹⁶ Such a classification might lead to the unfortunate result of an administrative body determining a purely judicial question without the usual safeguards of judicial procedure but, because of that fact, not being held to be judicial. The most frequent approach to the problem is that of determining the validity of delegation by the degree of finality of the administrative tribunal's action. The court in the instant case pointed out that, "as the determination of the labor commissioner is not a final determination of the matter submitted to him, it cannot be said that the statute attempts to invest in that administrative official the right to exercise any judicial function."¹⁷ This view, that, if the administrative determination is subject to some review or attack by a court, it is decisive of the fact that no judicial function has been conferred, is held by other courts.¹⁸ But some courts have refused to consider it,¹⁹ or have definitely stated that if the function is of a judicial nature an attempt to give authority to courts to review them and to correct the errors does not validate the administrative tribunal's authority.²⁰

¹⁴ *State ex rel. Brewen-Clark Syrup Co. v. Workmen's Compensation Comm.*, 320 Mo. 893, 8 S. W. (2d) 897 (1928); *Mackin v. Detroit Timken Axle Co.*, 187 Mich. 8, 153 N. W. 49 (1915).

¹⁵ *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551 (1897); *Louisville & N. Ry. v. McChord*, (C. C. A. 6th, 1900) 103 F. 216.

¹⁶ *Speer v. Stephenson*, 16 Idaho 707, 102 P. 365 (1909); *Crawford v. Hathaway*, 67 Neb. 325, 93 N. W. 781 (1903); *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 P. 258 (1900).

¹⁷ 70 P. (2d) 171 at 173. The court in support of the statement takes from 5 C. J. 17 (1916) the following quotation, "if the statute gives to the parties the further right by appeal from the decision of the arbitrators, or other procedure to carry the case before a regular judicial tribunal and have the issues there tried, it does not operate to deprive the parties of any constitutional right, and is therefore valid." The discussion from which this quotation is taken concerns the denial of a proceeding according to the course of the common law under the due process clause, and does not consider the delegation of judicial power question. Since the requirement to satisfy the doctrine of delegation of powers is more stringent than that for due process [see STASON, *CASES AND MATERIALS ON ADMINISTRATIVE TRIBUNALS* 65, note 5 (1937)], and since review by judicial determination satisfies the due process argument, it is submitted that the statute in question is clearly not violative of due process.

¹⁸ *Cosmopolitan Trust Co. v. Mitchell*, 242 Mass. 95, 136 N. E. 403 (1922); *Stuart v. Norviel*, 26 Ariz. 493, 226 P. 908 (1924); *In re Willow Creek*, 74 Ore. 592, 144 P. 505 (1914).

¹⁹ This was apparently true of the court of appeals in the instant case. *Collier & Wallis v. Astor*, (Cal. App. 1936) 56 P. (2d) 602 at 605.

²⁰ In *In re Opinion of the Justices*, 87 N. H. 492 at 494, 179 A. 357 (1935), the court said: "The view sometimes adopted that the right of appeal to the courts, either in wide or limited measure, saves action of an executive board from a valid charge of judicial invasion, is not considered to be sound in principle." For a similar

If judicial power is the power to decide finally,²¹ the former approach seems the more rational. Hence, if the administrative tribunal has authority to decide both law and facts without being subject to review by the courts, it is reasonable to say that such is an invalid delegation of judicial power. Where the only recourse for a destruction of property is a suit for damages against the administrative official, it would seem an invalid exercise of judicial power, but such action has been upheld.²² Where the administrative finding is final unless there is a showing of fraud, or that it is in excess of the powers of the tribunal,²³ or unless subsequently attacked by a court proceeding,²⁴ it has been held to be a valid act of an administrative agency. So also where the determination is final as to the facts,²⁵ or prima facie correct on the facts,²⁶ it has been held to be a proper decision for an administrative body. It would seem, therefore, that, where, as in the instant case, there is an opportunity for full review by the court on both law and facts in a trial de novo, the statute could not be said to confer on the administrative official an unconstitutional grant of judicial power.

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view, see *State ex rel. Monnett v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551 (1897); *McKnight v. Pecos & Toyah Lake Ry.*, (Tex. Civ. App. 1919) 207 S. W. 599; *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S. W. 301 (1921).

²¹ In *Illinois Cent. Ry. v. Dodd*, 105 Miss. 23, 61 So. 743, 49 L. R. A. (N. S.) 565 (1913), the court defined judicial power as "the authority to hear and finally determine controversies between adverse parties." See also, *Muskrat v. United States*, 219 U. S. 346, 31 S. Ct. 250 (1911); *Underwood v. McDuffee*, 15 Mich. 361 (1867); 4 WORDS AND PHRASES, 3d ser., 640-641 (1928).

²² *Lawton v. Steele*, 152 U. S. 133, 14 S. Ct. 499 (1894).

²³ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209 (1911).

²⁴ *Gregory v. Hecke*, 73 Cal. App. 268, 238 P. 787 (1925) (administrative decision subject to review on certiorari); *Meffert v. Medical Board*, 66 Kan. 710, 72 P. 247 (1903); *Hunter v. Colfax Consolidated Coal Co.*, 175 Iowa 245, 154 N. W. 1037 (1915).

²⁵ *Arkansas Wholesale Grocers' Assn. v. Federal Trade Comm.*, (C. C. A. 8th, 1927) 18 F. (2d) 866, certiorari denied, 275 U. S. 533, 48 S. Ct. 30 (1927); *Wells Elkhorn Coal Co. v. Vanhoose*, 220 Ky. 381, 295 S. W. 464 (1927); *Lowell Co-op Bank v. Cooperative Central Bank*, 287 Mass. 338, 191 N. E. 921 (1934).

²⁶ *State v. Jacksonville Terminal Co.*, 90 Fla. 721, 106 So. 576 (1925).