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Administrative Procedure

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Survey of Ohio Law—1953

ADMINISTRATIVE PROCEDURE

In the field of administrative procedure during the period surveyed, the courts have dealt with a wide range of matters: those concerned with invoking the quasi-judicial jurisdiction of an administrative agency; problems of an agency's power to act in various areas; and, lastly, procedures on appeal from a quasi-judicial decision of an administrative body.

Kent Provision Co. v. Peck[1] illustrates the fact that obtaining a hearing before an administrative body may be frustrated by procedural requirements as technical as those for which courts are sometimes criticized. Here the taxpayer filed with the board of tax appeals and the tax commissioner notices of appeal from a final determination by the tax commissioner. The commissioner filed a motion to dismiss the appeal before the board of tax appeals on the sole ground that the notice of appeal filed with the tax commissioner did not have attached thereto and incorporated by reference a copy of the final determination sent by the tax commissioner to the taxpayer as required by Section 5717.02, Ohio Revised Code (Section 5611, Ohio General Code) The board of tax appeals dismissed the appeal for want of jurisdiction and the supreme court affirmed. Judge Middleton, dissenting, emphasized the highly technical nature of the error, and that the tax commissioner could have notified the taxpayer's counsel so that the error could have been rejected within the statutory time limit. It would not seem that the great aims of administrative law are preserved by denying a citizen a hearing on such insubstantial grounds.

Several cases considered the scope of an administrative agency's authority under the statute empowering the agency to act. Under Section 4921.10, Ohio Revised Code (Section 614-87, Ohio General Code) the public utilities commission may for "good cause" "revoke, alter or amend" any certificate issued by the commission. In *Dworkin, Inc. v. Pub. Utilities Comm'n*[2] a motor carrier's certificate was suspended by the commission for 30 days for violations of a criminal statute and the commission's rules. The court held that the power to "revoke, alter or amend" includes the lesser authority to suspend operations under a certificate. Furthermore, the court sustained the board's ruling that suspension for "good cause" may be based upon a violation of a criminal statute (overloading a truck) even though there had been no criminal prosecution under the statute.

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[1] 159 Ohio St. 84, 110 N.E.2d 776 (1953).

[2] 159 Ohio St. 174, 111 N.E.2d 389 (1953).

McGowen v. Shaffer[3] involved the question of whether a county board of health had the power to license plumbers, to require permits for the installation of plumbing, and to charge fees for issuing such licenses and permits. The court found that whereas such powers were not directly granted in the statutes establishing this board, they were to be implied from the general police powers granted to the board. The fees charged for inspecting plumbing installations were particularly attacked, but the court found them reasonable charges for defraying the expenses of the board in making the inspections and therefore within the board's authority. If the collections had exceeded the expenses of inspections said the court, the charging of fees might then have ben *ultra vires*.

This issue of charging fees was also considered in *Stubbs v. Mitchell*,[4] and there a county board of health was held to have exceeded its authority. The board was empowered, said the court, to require all dogs in the county to be immunized annually against rabies. But such authority, said the court, did not give the board power to require a license fee of 50 cents for each immunization certificate. The money collected was turned over to the Humane Society to enforce the immunization regulation. The court thought the fees here were in the nature of a tax for general operating expenses and beyond the board's power.

The vexing problem of the scope of the court's authority on appeal from an administrative agency was again considered by the supreme court in *Sorge v. Sutton*.[5] This case involved the dismissal of two police officers from the force after a hearing before the Cleveland Civil Service Commission. Each officer appealed to the court of common pleas under Section 143.27 of the Ohio Revised Code (Section 486-17a, Ohio General Code), and the court, after considering the appeals on questions of law alone, affirmed. The court of appeals[6] reversed and remanded the matter on the theory that the common pleas court should have heard the matters as trials *de novo*. The supreme court disagreed, however, with the court of appeals. An "appeal" under Section 143.27, Ohio Revised Code (Section 486-17a, Ohio General Code)[7] to the common pleas court contemplates only a review

[3] 65 Ohio L. Abs. 138, 111 N.E.2d 615 (Summit Com. Pl. 1953)

[4] 65 Ohio L. Abs. 204, 114 N.E.2d 158 (Ohio App. 1952), *appeal dis'm* 158 Ohio St. 245, 108 N.E.2d 281 (1952).

[5] 159 Ohio St. 574, 113 N.E.2d 10 (1953).

[6] 62 Ohio L. Abs. 506, 107 N.E.2d 352 (App. 1952)

[7] The pertinent part of the section permits an appeal by the employee from a dismissal by the "appointing authority" and the commission " may affirm, disaffirm or modify the judgment of the appointing authority, and the commission's decision shall be final; provided, however, that in the case of a removal of a [policeman or fireman] of a municipality an appeal be had from the decision of the municipal commission to the court of common pleas of the county in which such municipality is situated to determine the sufficiency of the cause of removal."

of proceedings before the commission as to their legality and regularity, and to determine the sufficiency of the "cause of removal," and not a trial *de novo.* The word "appeal" must be interpreted in the light of the language of the statute, said the court. Here "appeal" means only that the court shall review the record made before the commission to determine the sufficiency of the evidence.[8] The law in Ohio is in a muddled state on the issue of whether an appeal from an administrative agency to a court of law requires a hearing *de novo,* or merely a review of the record.[9] The rationale presented by the decision in this case is not helpful in clarifying the law on this subject.

A second problem in appealing from an administrative agency's ruling was considered in *Corn v. Board of Liquor Control.*[10] There the director of liquor control had brought an action before the board of liquor control to suspend or revoke a permit. The board entered an order adverse to the permit holder in this case, and also ruled against the permit holder on his appeal from the director's refusal to review his permit. The permit holder appealed from each order to common pleas court under Section 119.12, Ohio Revised Code (Section 154-73, Ohio General Code) (Ohio Administrative Procedure Act) The common pleas court reversed both orders of the board. Thereupon the board and the members thereof, the department of liquor control and the director appealed to the court of appeals which accepted the cause and reversed the court of common pleas. The supreme court held the court of appeals should have granted the permit holder's motion to dismiss the appeals because none of the administrative officers or agencies had statutory authority to appeal. The heart of the supreme court's decision is that the administrative officers and agencies were not properly before the common pleas court, therefore they cannot appeal from that court's decision to the court of appeals. The court stated that only a "party adversely affected by an order of an agency" can appeal to the common pleas court under Section 119.12, Ohio Revised Code (Section 154-73, Ohio General Code), and an agency is not a "party" or "person" within Section 119.01, Ohio Revised Code (Section 154-62, Ohio General

[8] After the supreme court reversed the holding of the court of appeals on the trial *de novo* issue, the court of appeals reviewed the record in the case and sustained the common pleas court. Kelch v. Sutton, 114 N.E.2d 62 (Ohio App. 1953); *accord,* Shillat v. Cleveland, 113 N.E.2d 267 (Ohio App. 1953).

[9] For a discussion of this problem under § 119.12, Ohio Revised Code (§ 154-73, Ohio General Code) (Ohio Administrative Procedure Act) see Note, *State Administrative Procedure — Scope of Judicial Review,* 4 WEST. RES. L. REV. 45 (1952). See also, Board of Liquor Control v. Tancer, 62 Ohio L. Abs. 360, 107 N.E.2d 532 (Ohio App. 1951), *rehearing denied,* March 24, 1952, *appeal dis'm* 158 Ohio St. 128, 107 N.E.2d 127 (1952); Kearns v. Sherrill, 137 Ohio St. 468, 30 N.E.2d 805 (1940).

[10] 160 Ohio St. 9, 113 N.E.2d 360 (1953).

Code). The court did not think it persuasive that the same section provides that the hearing in the court of common pleas "shall proceed as in the trial of a civil action" and the court's order shall be final "unless reversed, vacated or modified on appeal." In effect, the court is saying because only the non-governmental litigant can appeal from an agency's ruling, the hearing in the common pleas court must be without representation on the part of the agency. It seems that the court is not recognizing the fact that one department of an agency may appear as a litigant before another department of the same agency which hears the matter as a separate and distinct department sitting as a quasi-judicial body. This appears to be the situation here: the director of liquor control was a litigant before the board of liquor control. The director certainly should be a party before the common pleas court, and should have the right of appeal from that court's decision if an adequate body of law is to be constructed for the agency to administer. The decision in this case insofar as it prevents the director from appearing in court on appeal seems contrary to the whole scheme of the Administrative Procedure Act. In view of the supreme court decision, the legislature must act by amending the Ohio Administrative Procedure Act[12] to permit adequate representation by administrative agencies of issues before the courts on appeals from quasi-judicial decisions.

As long as some adversary party representing the public interest, whether he be from a department of the agency involved, or from some other area, appears in the court hearing on appeal it would not seem important that the administrative board deciding the case is itself represented. In a case[13] involving this issue, a township board of zoning appeals attempted to appeal from a common pleas court decision reversing the board's ruling. The supreme court again dismissed the appeal on the ground that the board itself had no statutory authority to appeal. (The Administrative Procedure Act did not apply.) The court thought that the board's position, and the public interest, could be adequately represented on appeal by "the administrative officer, from whose decision an appeal to the board is authorized by statute,

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[11] This analysis was accepted by a court of appeals which had held contrary to the decision in the *Corn* case. Barn Cafe & Restaurant v. Board of Liquor Control, 63 Ohio L. Abs. 348, 107 N.E.2d 631 (Ohio App. 1952)

[12] The court in the *Corn* case cites some examples of administrative officers who are specifically given by statute the right to appeal from rulings of specified agencies and be heard in court, *e.g.*, the administrator of the bureau of unemployment compensation; the tax commissioner.

[13] A. Di Cillo & Sons, Inc. v. Chester Zoning Board of Appeals, 158 Ohio St. 302, 109 N.E.2d 8 (1952)

[14] For a case in which the court of common pleas took the rather extraordinary step of holding members of the board of liquor control in contempt of court for refusing to comply with the court's order see Socotch v. Board of Liquor Control, 51 Ohio Op. 106, 114 N.E.2d 114 (Franklin Com. Pl. 1953)