Case Western Reserve Law Review

Volume 8 | Issue 3 Article 6

1957

Administrative Law and Procedure

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Survey of Ohio Law—1956

ADMINISTRATIVE LAW AND PROCEDURE

Administrative Authority

Invalidity of statutory authority is an occasional ground for attacking the authority of an administrative agency. There is an example of this in the recent decision of the court of appeals[1] in the *Film Censorship* case.[2] Since the basic statutes[3] were invalid because of a conflict with the "free" speech guarantees of the fourteenth amendment,[4] the Superintendent of the Division of Film Censorship in the Department of Education had no authority to censor motion pictures and require a license from the Department of Education before exhibiting motion pictures.

Administrative Discretion

Two courts of appeals decisions considered specific aspects of judicial review of the exercise of administrative discretion. In a board of election action in receiving late filings of campaign expenditures by successful candidates, the Court of Appeals of Cuyahoga County[5] refused to upset the decision of the local board of elections in the exercise of its discre-

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[1] R.K.O. Radio Pictures, Inc. v. Department of Education, 130 N.E.2d 845 (Ohio App. 1955).

[2] This decision reversed the judgment of the Court of Common Pleas of Franklin County which had refused to enjoin the Superintendent from enforcing the censorship and licensing requirements. R.K.O. Pictures, Inc. v. Hissong, 123 N.E.2d 441 (Ohio C.P. 1954), commented on, 1955 Survey, 7 WEST. RES. L. REV. 255, 257 (1956).

[3] OHIO REV. CODE §§ 3305.01-3305.08.

[4] The per curiam opinion of the court of appeals states that the judgment is reversed on the authority of *R.K.O. Radio Pictures, Inc. v. Dep't of Education,* 162 Ohio St. 263, 122 N.E.2d 769 (1954), holding that any censorship order made by the Department of Education of the State of Ohio pursuant to such act must be held to be "unreasonable" and "unlawful" within meaning of OHIO REV. CODE § 3305.07 This was an original action in the Supreme Court of Ohio brought pursuant to OHIO REV. CODE § 3305.07, to review the orders of the Department of Education. The majority opinion expressed the view that its decision was mandatory in view of the position taken by the Supreme Court of the United States in *Superior Films v. Dep't of Education,* 346 U.S. 587 (1954)

[5] Brewer v. De Maioribus, 136 N.E.2d 772 (Ohio App. 1956). The court also determined that the filing requirements of OHIO REV. CODE § 3517.10 were mandatory, but that the time within which the statement should be filed was merely directory, and that the board did not abuse its discretion in accepting the filings under the circumstances.

tionary acceptance of the filings under the circumstances, pointing out that a court of equity will not substitute its judgment for that of a board of elections acting in a quasi-judicial capacity in the absence of clear proof of an abuse of discretion.

The Board of Liquor Control under the Liquor Control Act is empowered to exercise its discretion in determining whether the grant of an original permit or its renewal would not be conducive to the health, morals or general welfare of the public; and its refusal to grant a permit when based upon reliable, probative and substantial evidence will not be disturbed.[6] The court remarked that all presumptions favorable to the board's ruling must be indulged by the reviewing court, in arriving at a decision whether the denial by the board was in accordance with law.

Notice Requirements in License Revocations

Ohio Revised Code section 119.07 states that an agency required to give a hearing under the provisions of section 119.06 shall give notice to a party of his right to a hearing, if requested within 30 days of the time of the mailing of the notice. The court of appeals has held that the notice requirement applies only in the event the agency acted upon its own initiative and without any prior hearing. It did not therefore apply in a situation where an applicant had had a hearing before the Board of Liquor Control prior to an order revoking a permit. The statute does not contemplate the right to a second hearing before the Board on the issue of revocation.[7]

Hearing Before the Administrative Agency

1. *Official Notice*

In a license suspension appeal the common pleas court had determined that a chemical analysis of the liquor involved in the hearing was improperly admitted. On appeal the court of appeals had to determine whether a bottle which bore a label identifying it as wine with a content of 20% alcohol by volume was competent evidence of the contents. It was held that it is such common knowledge in Ohio that wine is an intoxicating beverage that the lower court and inferentially the Board of Liquor Control could take notice of its reputed intoxicating quality.[8]

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[6] American Legion Clifton Post v. Board of Liquor Control, 135 N.E.2d 82 (Ohio App. 1955)

[7] State v. Board of Liquor Control, 131 N.E.2d 245 (Ohio App. 1953).

[8] Mazzeo v. Board of Liquor Control, 136 N.E.2d 663 (Ohio App. 1955)

2. *Objections to Admissibility*

While the rules of the Board of Liquor Control provide that the production of evidence before the Board is to be governed by the rules of evidence required by Ohio courts in civil cases, on appeal the courts hold that the evidentiary rule must be invoked at the administrative hearing by a party objecting to its admissibility.[9] Thus hearsay evidence received without objection may be properly considered and given its natural probative effect, as if it were admissible. In another administrative appeal case,[10] the court of appeals took notice of applicant's objection that the Board of Liquor Control restricted the evidence which he could submit in support of his new application for a liquor permit. The record, however, failed to show that any restricted evidence was proffered. Under such circumstances the exclusionary ruling would not be prejudical.

3. *Entrapment*

The court of appeals held that entrapment, if established, may be employed as a defense to charges preferred against a licensee by the Director of Liquor Control in a proceeding before the Board of Liquor Control.[11]

Judicial Review

1. *Rule Making*

One court of appeals had to answer an attack upon its jurisdiction on two grounds in hearing an appeal from a decision of the court of common pleas, holding valid for legality and reasonableness certain rules adopted by the Ohio State Racing Commission.[12] To the first objection, that the review of rules provided by Ohio Revised Code section 119.11 is administrative and not judicial, the holding was that the review is a judicial function within the jurisdiction of the courts of Ohio. Then, to the specific objection that the court of appeals had no jurisdiction to review the common pleas court, the answer was that Revised Code section 119.11 authorizes such an appeal.

2. *Methods of Review*

A court of appeals decision refused to interfere by the use of the injunctive process to prevent an agency's instituting proceedings for the

[9] Di Matteo v. State, 130 N.E.2d 351 (Ohio App. 1955).

[10] Scharff v. State, 99 Ohio App. 139, 131 N.E.2d 844 (1955)

[11] Langdon v. Board of Liquor Control, 98 Ohio App. 535, 130 N.E.2d 430 (1954)

[12] Standard "Tote" v. Ohio State Racing Comm'n, 98 Ohio App. 494, 130 N.E.2d 455 (1954).

revocation or suspension of a license. This case also raised a question of the necessity for the adoption of administrative rules specifying the specific acts or conduct which may be used as a basis for citations for violation of the statutory cause for revocation of liquor permits: "other sufficient cause, to wit, failure to maintain decency and good order on permit premises."[13] It was held that the Board of Liquor Control need not anticipate and list through rules and regulation the many reasons for the issuance of citations against permit holders to show cause why permits should not be suspended or revoked.

The Supreme Court continues to deny the use of the writ of prohibition against an administrative agency as an alternative method of judicial review. In an original action[14] in the Supreme Court to prevent the Ohio State Racing Commission from allegedly exceeding its statutory powers, the court denied the writ because there was a plain, adequate remedy afforded by a provision in the statute for the use of the injunction. This decision must be contrasted with that of the court of appeals in *Gouchenour v. Hendricks*,[15] in which a petition in prohibition was held good against a demurrer, wherein it was alleged that the statutory appeal would result in irreparable injury to the petitioner's business.

Mandamus may not be used as a substitute for an appeal to review the discretionary action of an administrative agency. Thus the issuance, suspension, revocation or renewal of liquor permits by the Board of Liquor Control may be reviewed by a statutory appeal which precludes the use of mandamus in the absence of a showing that the Board has refused or failed to comply with a specific requirement of the law.[16]

Another interesting court of appeals case considered whether the court of common pleas could dismiss an appeal from an order of the Board of Liquor Control refusing to renew a permit, when there was already pending an appeal from the same common pleas court's decision in a contempt proceeding ordering that a renewal be granted. It was held that the statute covering the appeal required the common pleas court to hear and determine the appeal.[17]

3. *Notice of Appeal*

A court of appeals determined that Ohio Revised Code section 119.12,

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[13] Howell v. Bryant, 99 Ohio App. 49, 53, 130 N.E.2d 837, 840 (1954)

[14] State v. Ohio State Racing Comm n, 164 Ohio St. 312, 130 N.E.2d 829 (1955).

[15] 99 Ohio App. 27, 131 N.E.2d 228 (1954).

[16] State v. Board of Liquor Control, 131 N.E.2d 245 (Ohio App. 1953)

[17] *In re* Socotch's Appeal, 137 N.E.2d 885 (Ohio App. 1953) It had already been held in *Socotch v. Krebs*, 97 Ohio App. 8, 119 N.E.2d 309 (1953), that the court did not have jurisdiction in the contempt citation to reach the question involved on the appeal.

requiring that notice of appeal from an administrative agency decision must be filed within the 15 days after the mailing of the notice of the order, sets out a mandatory requirement which must be observed regardless of the reason for the failure to give notice.[18] This position is similar to that previously taken under the statutes applying to the Public Utilities Commission and the Bureau of Unemployment Compensation.

4. *Appeal by the Administrative Agency*

The Ohio Administrative Procedure Act did not originally make any provision for an appeal by an agency,[19] and the Supreme Court held that the agency could not appeal.[20] The Court of Appeals of Franklin County had taken a contrary position previously, and in three decisions[21] rendered prior to the amendment of the law in 1953 that court denied motions to dismiss appeals by the Board of Liquor Control.

Since the amendment to the Ohio Administrative Procedure Act, it is now very clear that the agency may appeal.[22] Indeed, in one case an appeal was taken without any objection being made.[23]

5. *Scope of the Review of an Agency Order*

Under the Ohio Administrative Procedure Act as originally enacted, the Supreme Court had held in *Farrand v. State Medical Board*[24] that a court of common pleas in reviewing an order of an administrative agency could not substitute its judgment for that of the agency. The General Assembly, in 1951, rewrote the entire paragraph of Ohio General Code section 154-73 relative to appeals.[25] Despite the insertion of additional authorization for action by the reviewing court, in *Rufo v. Board of Liquor Control*[26] the court of appeals held that the statutory change did not affect the prior rule of the Supreme Court and that the reviewing court has no power now to substitute its judgment for that of the agency.

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[18] Arndt v. Scott, 134 N.E.2d 82 (Ohio App. 1955).

[19] OHIO REV. CODE § 119.12, amended, 125 Ohio Laws 342, effective Oct. 21, 1953.

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

[21] Tuma v. Board of Liquor Control, 137 N.E.2d 788 (Ohio App. 1953).

[22] State v. Board of Liquor Control, 131 N.E.2d 245 (Ohio App. 1953), applying the remedial procedure to proceedings pending before the amendment in accordance with its terms.

[23] Fernberg v. Board of Liquor Control, 130 N.E.2d 717 (Ohio App. 1954).

[24] 151 Ohio St. 222, 85 N.E.2d 113 (1949).

[25] This is identical with the present provisions of OHIO REV. CODE § 119.12, relative to powers of the court upon an appeal.

[26] 130 N.E.2d 374 (Ohio App. 1954).

Such a construction of the amended statute was challenged in the Supreme Court. In reversing the court of appeals in the *Rufo* and a companion case, the court stated that the statute now provides for something more than a review on merely issues of law as proclaimed in the *Farrand* case. The Ohio Administrative Procedure Act, however, now provides for an appeal which still falls short of a trial de novo. The common pleas court is limited to an examination of the record of the hearing before the administrative agency and such additional evidence as the court in its discretion may allow to be presented upon the theory that it is newly discovered:

> The court must read and consider all the evidence offered by both sides and must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof. In other words, the court may reverse, vacate or modify the order of the agency, unless it finds that it is supported by reliable, probative and substantial evidence and is in accordance with law.[27]

Thus if the common pleas court cannot make a finding that the agency's order is supported by reliable, probative and substantial evidence and is in accordance with law, it is authorized to reverse, vacate or modify the order of the agency.

Where there is a finding that the order of an agency subject to review under these provisions is supported by reliable, probative and substantial evidence, the common pleas court, in practice, must affirm the order if it is otherwise in accordance with law, according to numerous court of appeals decisions.[28]

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AGENCY

The Problem of the Borrowed Servant

A problem of frequent occurrence and considerable difficulty arises where a servant is, at the time of the accident, acting in some sense as a servant of two masters. The typical case involves a general employer who

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[27] Andrews v. Board of Liquor Control, 164 Ohio St. 275, 280, 131 N.E.2d 390, 393, 394 (1955)

[28] Quinn v. State Board of Real Estate Examiners, 137 N.E.2d 777 (Ohio App. 1956); Burgerr v. Board of Liquor Control, 135 N.E.2d 786 (Ohio App. 1955); Abdoney v. Board of Liquor Control, 101 Ohio App. 57, 135 N.E.2d 775 (1955); DiMatteo v. State, 130 N.E.2d 351 (Ohio App. 1955); Ross v. Board of Liquor Control, 135 N.E.2d 629 (Ohio App. 1954); Shranko v. Board of Liquor Control, 134 N.E.2d 173 (Ohio App. 1953); Miecznikewski v. State, 135 N.E.2d 641 (Ohio C.P. 1952)