Case Western Reserve Law Review

Volume 14 | Issue 4 Article 8

1963

Comment: Ohio Administrative Law and Procedure--Recent Developments

Maurice S. Culp

COMMENT

Ohio Administrative Law and Procedure— Recent Developments

*Maurice S. Culp**

This review of Ohio law covers the period of January 1962 through June 1963.[1]

POWER OF ADMINISTRATIVE AGENCY TO CONSIDER THE VALIDITY OF A STATUTE

One of the distinct differences between an administrative agency and a court of first instance lies in the scope of matters which may be presented to the respective tribunals. The administrative agency is wholly a creature of statute, and it can only exercise the functions granted to it by statute. Agency statutes do not expressly provide for the consideration of issues of law.

The Ohio Supreme Court has said that the Board of Tax Appeals has no jurisdiction to pass on the constitutionality of a taxing statute.[2] This view, in reference to the Ohio Use Tax, was followed by the court of appeals in *Riss & Co. v. Bowers*.[3]

Thus, the very first opportunity to raise issues of the validity of legislation is not at the administrative agency level, but before the court which has the first opportunity to afford judicial review.[4]

EXERCISE OF LEGISLATIVE POWER BY LOCAL ADMINISTRATIVE AGENCY

It is not often that a municipal administrative body has asserted the authority to establish criminal penalties for the violation of a municipal administrative regulation.

---

*THE AUTHOR (A.B., A.M., Illinois, LL.B., Western Reserve, S.J.D., Michigan) is a a Professor of Law at Western Reserve University.

1. For previous comparable reviews, see *Administrative Law and Procedure, Survey of Ohio Law*, Vols. 4-12 W. RES. L. REV. (1954-60). For the last survey see Culp, *Administrative Law and Procedure, Survey of Ohio Law* — 1961, 13 W. RES. L. REV. 425 (1962).

2. McCreary v. Bowers, 168 Ohio St. 64, 150 N.E.2d 850 (1958), dismissing for want of a debatable constitutional question the appeal from a court of appeals decision to this effect.

3. 114 Ohio App. 429, 182 N.E.2d 862 (1961).

4. This rule seems equally applicable at any level, including local administrative agencies of all types. The supreme court decision, recognizing this rule, involved a state agency not subject to the Ohio Administrative Procedure Act.

In *City of Avon Lake v. Burke*,[5] the City Board of Municipal Utilities undertook to adopt a by-law under the city charter which made it a misdemeanor to violate a water department rule. The affidavit which charged the defendant with this offense referred to no statute or ordinance which established the offense. The charter of the city involved vested most legislative power in the council. It was argued that the power rested in the board to make by-laws and regulations for the management of the public utilities, while having the status of ordinances, could not extend to the definition of crime. The municipal court, in discharging the defendant, held that the attempt to define criminal conduct by the Board of Municipal Utilities through a by-law is repugnant to the Ohio Constitution. It was also held that the affidavit did not define an offense. As a result, the affidavit failed in the municipal court on both grounds. This position is consistent with the view of the Supreme Court of Ohio[6] that at the state level the Ohio General Assembly may not delegate "true" legislative power.

However, the power of the board was derived from charter section 51, based on municipal home rule powers under article XVIII, section 3 and 7 of the Ohio Constitution. The Court of Appeals of Lorain County held that this source of power was most significant. In reversing the lower court, the court of appeals cited with approval a statement that the doctrine of separation of powers does not apply to a charter municipality. The court's opinion states[7] that the Avon Lake charter does not limit the exercise of legislative power to the City Council; and that it also invests limited legislative authority in the Board of Municipal Utilities. With its direct grant of power, the board thus has "legislative" power similar to the City Council and both have direct grants of power from the people. This decision thus unfolds interesting possibilities of combining legislative, executive, and investigative powers in one municipal authority — presently denied at the state level.

APPLICABILITY OF THE OHIO ADMINISTRATIVE PROCEDURE ACT

Litigants continue to present issues concerning the applicability of the Ohio Administrative Procedure Act to local administrative bodies.

In *Karrick v. Board of Educ.*,[8] the issue presented was whether the rules and regulations of a municipal civil service commission had to be

5. 180 N.E.2d 645 (Avon Lake Munic. Ct. 1962).

6. See Weber v. Board of Health, 148 Ohio St. 389, 74 N.E.2d 331 (1947), decided under Ohio Const. art. II.

7. City of Avon Lake v. Burke, 115 Ohio App. 541, 186 N.E.2d 94 (1962).

8. 174 Ohio St. 467, 190 N.E.2d 256 (1963).

adopted in accordance with the requirement of a state statute. The court held that the definition of agency[9] in the statute was clearly confined to agencies at the state level. The decision is supported by the background studies which preceded the adoption of the statute in 1943.

Conflict Between State Administrative License and Municipal Ordinances

In *Auxter v. City of Toledo*,[10] the plaintiff had been issued a C-2 permit (license) by a state administrative agency pursuant to the Ohio Liquor Control Act.[11]

The Toledo Municipal Code prohibited the carrying on of any such business without a city license to do so, which was obtainable only after paying a fee. Plaintiff brought a declaratory judgment action in the common pleas court to determine the validity of the Toledo ordinance.

The effect of the state license, though issued by administrative authority, was prescribed by a statute[12] which authorizes the named person to carry on the business at the place indicated in the license. The trial court, affirmed by the court of appeals, held the Toledo licensing order valid. The court of appeals, finding its decision in conflict with that of another court of appeals, certified the record to the supreme court for review and final determination. In reversing the *Auxter* judgment, the court held the municipal licensing ordinance unconstitutional under section 3 of article XVIII of the Ohio Constitution. The Toledo ordinance was considered a local police regulation under section 3, article XVIII and, therefore, in direct conflict with general laws enacted by the state legislature.

The *Auxter* case has significance because it removed a conflict between courts of appeals, and by unanimous decision, established a precedent for the paramount position of lawful licenses issued by state agencies over conflicting municipal licensing ordinances.

Validity of Administrative Rules

An important feature of the Ohio Administrative Procedure Act is the requirement that the adoption, amendment, or rescission of the rules and regulations of agencies encompassed by the act must comply with the statutory procedural steps outlined for the process.[13] A failure to comply with one or more procedural steps invalidates the administrative

9. Ohio Rev. Code § 119.01(A) (hereinafter cited as Code §).
10. 173 Ohio St. 444, 183 N.E.2d 920 (1963).
11. Code §§ 4303.01-.99.
12. Code § 4303.27.
13. Code § 119.03.

"rule."[14] An equally important provision is the opportunity afforded any adversely affected person to obtain judicial review of the "rule" by the filing of an appeal within fifteen days after the agency order[15] promulgating the rule.

This judicial review procedure has been used to attack the rules of several agencies. Thus, in *Golubski v. Board of Embalmers & Funeral Directors*,[16] a rule of the Board of Embalmers and Funeral Directors was held invalid for failure to comply with mandatory procedural requirements. The board's rule, which prohibited the serving of food or beverages to the public in connection with a funeral service, was invalid, not only because it failed on procedural grounds, but also because it exceeded its authority.[17] It is mandatory that the amendment of a rule under the Ohio Administrative Procedure Act be made by the issuance of a new rule containing the *entire* rule as amended. A rule is also fatally defective if it does not designate an effective date.

The hearing held prior to the adoption of the rule must be adequate to protect its validity. The rule is invalid if the hearing unreasonably restricts interested persons in the exercise of their rights established by statute, and when inadequate time is given for the hearing.

The Ohio Administrative Procedure Act requires that the notice of rule making contain a concise statement of the contents of the proposed regulation. In *Maggiore v. Board of Liquor Control*,[18] notice of the Board of Liquor Control indicated that a rule-making hearing would consider minimum mark-up for retail sales. No statement of percentages to be considered was included in the notice. A rule was in fact proposed and adopted which called for twenty per cent minimum mark-ups. Despite an affirmance by the common pleas court, the court of appeals held that the notice failed to conform to the statutory requirement of a synopsis or concise statement of the proposed regulation. It was therefore invalid for failure to follow procedural requirements.

The Ohio Racing Commission promulgated Rule 311 which provided for the suspension, diminution, or revocation of the permit or future permit of the trainer and permit holder for the track when a horse entered in a race at the track was found to be stimulated or doped. This, in ef-

14. CODE § 119.02.

15. CODE § 119.11.

16. 114 Ohio App. 111, 180 N.E.2d 861 (1961). Motion to certify the record was denied by the supreme court later in 1961.

17. Under CODE § 4714.04, the board may adopt standards of service and practice to be followed in the professions of embalming and funeral directing. The court considered that the incidental prohibition of food and liquor service by the board was not within this statutory grant, especially since food regulation had been delegated to the Public Health Council (CODE § 3732.02), and the sale of intoxicating liquors is fully regulated by CODE §§ 4301.01-4399.99.

18. 115 Ohio App. 131, 184 N.E.2d 284 (1961).

fect, made the race track operator an absolute insurer of the condition of the horses. The validity of this rule was challenged within the fifteen day period and held invalid as related to permit holders by the court of common pleas. This decision was affirmed by the Court of Appeals for Franklin County,[19] where it was held that the purpose of the rule — to stop the doping of horses — could not be reasonably effected because of the lack of supervision over the horses for any considerable period before racing. The concurring judge's opinion points out that such a drastic rule is unreasonable in relation to the control which the track operator has over the potential sources of danger.

JUDICIAL REVIEW

The power of an administrative agency to modify an order after an appeal has been taken is not consistent from agency to agency. By statute,[20] the Industrial Commission has continuing jurisdiction over its orders. The supreme court, however, has held that other agencies do not have this continuing power after an appeal. Thus, there is power in the Board of Tax Appeals,[21] the county commissioners,[22] and the county recorder[23] to maintain continuing jurisdiction only until the expiration of the time allowed for institution of an appeal. The Board of Liquor Control was added to this group in *Diltz v. Crouch*,[24] through the holding that the board cannot modify an order of revocation after an appeal has been taken from the order. The opinion indicates that it will require an act of the legislature to establish continuing jurisdiction over the board's orders.

PERFECTING AN APPEAL

Notice

The strict notice requirements under the Appellate Procedure Act are often followed on judicial review of an administrative agency. Thus, the reviewing court will neither consider the errors not assigned nor the errors assigned but not noticed in the brief on judicial review of the Board of Tax Appeals.[25]

19. Ohio Thoroughbred Racing Ass'n v. Ohio State Racing Comm'n, 114 Ohio App. 80, 180 N.E.2d 276 (1961).

20. CODE § 4123.52.

21. National Tube Co. v. Ayres, 152 Ohio St. 255, 89 N.E.2d 129 (1949).

22. State *ex rel.* Maxson, 167 Ohio St. 458, 149 N.E.2d 918 (1958).

23. Mariemont, Inc. v. Schaefer, 171 Ohio St. 481, 172 N.E.2d 458 (1961).

24. 173 Ohio St. 367, 182 N.E.2d 315 (1962).

25. Riss & Co. v. Bowers, 114 Ohio App. 429, 182 N.E.2d 862 (1961), construing CODE § 2505.21. On the second point of its decision, the court of appeals relied on Uncapher v. Baltimore & Ohio R.R., 127 Ohio St. 351, 185 N.E. 553 (1933), where the syllabus stated that the court was not obligated to search the record for errors not mentioned in brief or oral argument.

However, appeals taken under individual agency statutes may not be applied so literally. This seems true of appeals under the unemployment compensation statute.[26] In *Toth v. Board of Review*,[27] the court of appeals held that a notice of appeal, which contained no formal statements of error, was adequate under the statute when it clearly set forth the substance and effect of the decision appealed. The purpose of notice is to apprise the opposite party and the court of the decision and the errors. If this is accomplished substantially, the notice need not set forth a complete copy of the judgment.

Necessity for Rehearing

Appeals from the orders of several state level agencies can only be taken after the agency has acted on a petition for rehearing. Such an agency was the Unemployment Compensation Board of Review[28] prior to October 15, 1959.[29]

In *Howell v. Bureau of Unemployment Compensation*,[30] claimant, after a decision had been mailed, and within the statutory time limit, filed an application to "institute for their appeal." The request was denied formally, and claimant filed a notice of appeal to the common pleas court. The common pleas court seems to have considered the claimant's acts the equivalent of a formal request for a rehearing and rejected all efforts of the board to have the appeal dismissed. On appeal to the court of appeals from the lower court's reversal of the board, the judgment was reversed. The court held that the appeal was premature because it was not based on the board's order following a formal request for a rehearing.

This holding seems unduly technical and takes no account of claimant's apparent attempt to secure a rehearing while using, in his own description, "a further appeal." Fortunately, as to this agency, the requirement of a rehearing was abolished as of Oct. 15, 1959.[31] This strict principle of construction may be encountered, however, under other statutes where the rehearing formula is a prerequisite to judicial review.

Standing to Appeal

By the Ohio Administrative Procedure Act, standing to appeal is determined for all agencies subject to the appropriate sections of that act.

26. CODE § 4141.28.

27. 116 Ohio App. 258, 183 N.E.2d 462 (1962). The court in reversing the judgment of the common pleas court, placed strong reliance on the supreme court's decision in Moore v. Foracher, 156 Ohio St. 255, 102 N.E.2d 8 (1951), which unquestionably supports this liberal view.

28. 126 Ohio Laws 348 (1955).

29. CODE § 4141.28 (Supp. 1962), as amended effective Oct. 15, 1959, 128 Ohio Laws 261 (1959).

30. 115 Ohio App. 506, 185 N.E.2d 765 (1961).

31. 128 Ohio Laws 261 (1959).

The rule-making authority of the unemployment compensation agency is subject to that act.[32]

An employer who is amenable to the unemployment compensation law and is active in a hearing is a person "adversely affected" under the act,[33] and may secure judicial review.[34]

Standing to appeal from state agencies not covered by this general procedural statute will be determined under an agency's special statute. Standing to appeal from township zoning authorities is determined under a special statute, or the general statute for judicial review of all administrative agencies below the state level.[35]

Appeals from township boards of zoning appeals may be taken under the special[36] or the general[37] statute. Under both statutes, a resident and property owner who, in response to a published notice of a hearing, appears before the township board, protests a change in a zoning area, and indicates his intention of appealing an adverse decision has standing to appeal by following the required procedural steps.[38]

Standing of the Agency

In the absence of statutory authorization, an agency has no right of appeal from an adverse decision of the initial reviewing court.[39] The Ohio Administrative Procedure Act provided for an appeal on question of law and constitutionality only.[40]

A decision of the court of common pleas which reverses an order of the Board of Liquor Control for failure to have reliable, probative, and substantial evidence in its support is not appealable by the board.[41]

Appeals Under Chapter 2506

The Supreme Court of Ohio has held that Chapter 2506 provides a plain and adequate remedy at law to test the validity of a zoning ordinance.[42] What is the situation, however, when a board of zoning appeals refuses to entertain an appeal from the denial of a zoning permit? The final order, if there was one in this situation, was the refusal to accept the

32. Code § 119.01(A).

33. Code § 119.03(C).

34. Columbus Green Cabs v. Board of Review, 184 N.E.2d 257 (Ohio C.P. 1961).

35. Code § 2506.01-.04 (Supp. 1962).

36. Code § 519.15.

37. Code §§ 2506.01-.04 (Supp. 1962).

38. Roper v. Board of Zoning Appeals, 173 Ohio St. 168, 180 N.E.2d 591 (1962).

39. For state agencies, see Corn v. Board of Liquor Control, 160 Ohio St. 9, 113 N.E.2d 360 (1953). For local authorities, see DiCillo & Sons, Inc. v. Chester Zoning Bd. of Appeals, 158 Ohio St. 302, 109 N.E.2d 8 (1952).

40. Code § 119.12.

41. Cranwood Steak House, Inc. v. Board of Liquor Control, 115 Ohio App. 463, 185 N.E.2d 576 (1961).

42. State *ex rel.* Gund Co. v. Village of Solon, 171 Ohio St. 318, 170 N.E.2d 487 (1960).

appeal. There could hardly be a final order on the merits under the circumstances. However, in *Shaker Country Corp. v. Shaker Heights Bd. of Zoning Appeals*,[43] the court of appeals treated this as a "final order" within the meaning of Chapter 2506 and held that the court of common pleas had jurisdiction over the appeal. The court of appeals cited other appellate decisions holding that Chapter 2506 provides an adequate remedy, but most of these cases involved attempts to avoid an administrative appeal by the use of mandamus. The basic question remains: where was the final order upon which an appeal under Chapter 2506 must be predicated?[44] Would not mandamus be a proper remedy to compel the Zoning Board of Appeal to take jurisdiction and render a final decision?

New Evidence on Appeal Under Ohio Administrative Procedure

The design of the statute allows for judicial review of the record made at the administrative hearing,[45] and provides for a limited presentation of evidence on initial judicial review.[46]

A common pleas court decision[47] emphasizes the practical importance of the "newly discovered evidence rule." In this case, the appellant had been charged with collecting extra real estate commissions under false pretenses, and the Ohio Real Estate Commission had, after a hearing, revoked his license. At the initial hearing, evidence concerning the genuineness of a signature was presented, and appellant was unable to counter with expert testimony at that time. Appellant could not produce his receipt book at the hearing as ordered by the commission. However, he did discover it after further search. Also, a specific bank record became material as a result of the testimony of witnesses at the trial. At the hearing of his appeal, the appellant sought to introduce an expert witness, to examine the handwriting in the receipt book and in the bank record. In a very succinct opinion, the common pleas judge indicates the reasons why each of these items of evidence should be allowed at the hearing. The opinion is, therefore, very illuminating on the matter of allowing newly discovered evidence on judicial review.[48]

43. 180 N.E.2d 27 (Ohio Ct. App. 1962).

44. Under CODE § 2506.01, defining a final order, the order refusing an appeal was not the kind of an order appealable under Ch. 2506.

45. CODE § 119.12.

46. *Ibid.*

47. Ohio Real Estate Comm'n. v. Cohen, 187 N.E.2d 641 (Ohio C.P. 1962).

48. *Id.* at 645. The record did not contain findings of fact, and the court had to assume that the order of revocation was based upon an implied finding that the board considered as established by the evidence the charges set out in the administrative complaint served on the appellant.

The opinion is also valuable as a verbalization of the mental process required of the reviewing judge as he considers whether the administrative order is "supported by reliable, probative and substantial evidence," pursuant to Code § 119.12.