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# Administrative Law and Procedure

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# Survey of Ohio Law—1957

## ADMINISTRATIVE LAW AND PROCEDURE

### *Exclusive Administrative Jurisdiction*

While Ohio has no comprehensive labor statutes establishing an administrative procedure for the adjudication of unfair labor practices, recent decisions of the Supreme Court of the United States[1] indicate that no state agency, administrative or judicial, has any jurisdiction over unfair labor practices which come within the jurisdiction of the National Labor Relations Board, even though the Board has declined to exercise jurisdiction without at the same time ceding jurisdiction to state agencies. Thus, no Ohio court may interfere in a labor dispute with respect to the unfair labor practice aspects in any case in which interstate commerce is affected.[2] The exclusive remedy is through the federal agency, and, if the federal agency declines to take jurisdiction, there is no state injunctive remedy available.[3]

Two important Ohio decisions[4] during 1957 outlined those matters with which the state may still deal despite exclusive federal administrative jurisdiction over unfair labor practices relative to interstate commerce. In the extended litigation under the title of *Richman Bros. Co. v. Amalgamated Clothing Workers*,[5] the court of appeals summarized the jurisdiction remaining in the state courts to deal with mass picketing: a state court has jurisdiction to enjoin such picketing or other course of conduct which interferes with the means of ingress and egress to and from the employer's place of business and interferes with pedestrial or vehicular traffic in and about the place of business. Also the state court

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[1] Guss v. Utah Labor Relations Bd. 353 U.S. 1 (1957); Amalgamated Meat Cutters & Butcher Workmen of North America v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).

[2] Amalgamated Meat Cutters & Butcher Workmen v. Fairlawn Meats, Inc., 353 U.S. 20 (1957), holding that a court of common pleas had no jurisdiction to enjoin union conduct of a kind which was regulated by the National Labor Relations Act. (The injunction was issued against picketing, trespassing, and exerting secondary pressures on the petitioner's suppliers.) The Court did not pass on the issue of jurisdiction to enjoin trespassing on petitioner's real property because the state decree was based on state power to reach union conduct in its entirety.

[3] In United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1953), the Supreme Court decided that the jurisdiction of the National Labor Relations Board over unfair labor practices did not preclude a common-law action for damages against the perpetrators of the unfair labor practices.

[4] The general significance of these two Ohio cases will be developed in the later survey article on Labor Law.

[5] 144 N.E.2d 573 (Ohio Ct. App. 1957).

has jurisdiction to enjoin activity which is contrary to law and order and the peace and dignity of the state of Ohio.

Out of the Standard Oil strike of the mid-year came another decision which points to another ground for a state equity court's intervention in a labor dispute over which the federal agency has almost exclusive jurisdiction. In the *Standard Oil Company v. Oil, Chemical and Atomic Workers International Union*[6] case, the court granted a permanent injunction against picketing or other concerted activity to prevent an inducement or any inducement to breach an existing contract between an employer and another union.

*Dible v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*[7] points to the importance of evidence in the record to show that petitioner was engaged in work affecting interstate commerce, to oust the state courts of jurisdiction. In the absence of evidence which shows that the plaintiff was engaged in interstate commerce or that he was engaged in work or activity affecting commerce between the states, the state court does have jurisdiction to protect the plaintiff in a labor controversy.

Under Section 4905.04, Ohio Revised Code, the Public Utilities Commission is vested with power and jurisdiction to supervise and regulate "public utilities and Railroads" and to require all public utilities to furnish their products and render their services exacted by the commission or by law, and the Supreme Court alone has power to review orders of the Public Utilities Commission.[8] The existence of this exclusive administrative jurisdiction-review procedure does not deprive a court of equity of its jurisdiction to prevent a utility from depriving a petitioner of his property rights without due process of law.

In *Laffer v. Cincinnati & Suburban Bell Telephone Co.*,[9] the common pleas court issued a temporary mandatory injunction requiring the defendant to restore telephone service to the plaintiffs, placing the duty upon the plaintiffs to initiate a complaint forthwith with the Public

[6] 144 N.E.2d 517 (Ohio C.P. 1957). This decision is based upon the Ohio rule that equity may interfere to prevent the inducement of a breach of contract when damages cannot provide an adequate remedy.

[7] 101 Ohio App. 233, 139 N.E.2d 57 (1955). This was a trial de novo on an appeal on questions of law and fact upon a petition seeking to enjoin the defendant local and its business agent from picketing a job undertaken by the plaintiff and completed before the hearing in the court of appeals. Thus, at the time of the hearing in the appellate court, the question had become moot except with respect to the costs, and the court of appeals determined that there was jurisdiction in the court of common pleas and that the plaintiff was entitled to his costs. The cause was then dismissed at the defendants' costs.

[8] Northern Ohio Telephone Co. v. Putnam, 164 Ohio St. 238, 130 N.E.2d 91 (1955).

[9] 144 N.E.2d 158 (Ohio C.P. 1957).

Utilities Commission to determine the merits of their cause. The court did not pass upon any power of the Commission after hearing to order discontinuance of service for the use of a utility facility in gambling operations, but did determine that equity has the power to retain the status quo until a matter has been heard on its merits.

## Necessity of Adhering to Agency Rules

*State v. Industrial Commission*[10] considers the nature of regularly adopted agency rules of procedure for appellate review within the agency and the consequences of a failure of the appellate body to follow such rules. A district board of claims had held a hearing on a disability claim and granted a permanent partial disability award. The Industrial Commission granted a hearing on the board's findings and considered additional evidence than that in the record, despite the fact that its rules forbade a review unless it appeared that the action of the board of claims was clearly against the weight of the evidence or contrary to law, and in the event of a hearing only the evidence contained in the claim record can be considered. The court of appeals issued an original writ of mandamus to reinstate the award of the board of claims, stating that the regularly adopted rules of the commission are a part of the law of the state, and that the commission abused its discretion in disregarding the two rules mentioned.

## Agency Proceedings

*In Re Slavens*[11] raised an issue as to the requirements of a quorum necessary to enable an agency to act when the basic statute is silent on the number of members required to transact business. The Supreme Court states that an agency of three or more members may act through a majority of a quorum, consisting of a majority of the members, provided all members had notice and an opportunity to be present. Furthermore, in the absence of evidence in the record showing to the contrary, notice to all members is presumed and all are regarded as constructively present.

*Codosky v. Department of Liquor Control*[12] indicates that an agency must permit a party who has summoned witnesses who have failed to obey the summons, to present the oral testimony of such witnesses at the first opportunity they are available, when he desires to present them in person and the hearing is still open when the request is made.

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[10] 144 N.E.2d 117 (Ohio Ct. App. 1956).

[11] 166 Ohio St. 285, 141 N.E.2d 887 (1957).

[12] 139 N.E.2d 690 (Ohio Ct. App. 1956).

## *Necessity for Specific Charge in Notice of Hearing on License Revocation*

Section 119.07, Ohio Revised Code, requires any agency to include in its notice the charges or other reasons for proposed license revocation, and the law or rule directly involved. When a notice charged the violation of a specified numbered section of the Certificate of Motor Vehicle Title Laws and the findings of the Ohio Motor Vehicle Dealer's and Salesmen's Licensing Board specified another, the resulting order is invalid for non-compliance with the Ohio Administrative Procedure Act.[13]

## *Judicial Review*

Appeal by an agency from the adverse decision of the common pleas court is clearly permitted under the Ohio Administrative Procedure Act.

Section 119.12, Ohio Revised Code, authorizes the agency to appeal. *Katz v. Department of Liquor Control*[14] decided that this right of the agency to appeal did not exist when the adverse decision is challenged solely on the ground that the order is not supported by any reliable, probative, and substantial evidence in the record. Stated in another way, the agency may appeal only upon questions of law relating to the constitutionality, construction, or interpretation of statutes and the rules and regulations of the agency.[15]

## *Perfecting the Appeal*

The general policy where a statute confers the right of appeal is to insist upon adherence to the requirements of the statute as a condition of the enjoyment of the right.[16] In *Kendall v. Adm'r. and Board of Review,*

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[13] Ohio Motor Vehicle Dealer's and Salesmen's Licensing Board v. Memphis Auto Sales, 103 Ohio App. 347, 142 N.E.2d 268 (1957). However, the most important holding of the court is that OHIO REV. CODE § 4517.06, which sought to restrict retail sales of new motor vehicles to such persons who have a franchise from the manufacturer of the automobile was invalid and violative of the 14th amendment, of the United States Constitution and of Art. 1, Sec. 1, Ohio Constitution, together with rules issued thereunder.

[14] 166 Ohio St. 229, 141 N.E.2d 294 (1957). For the decision in the court of appeals see, 145 N.E.2d 553 (Ohio Ct. App. 1956). If the agency has standing to appeal, then the court of appeals, upon a properly perfected appeal, has jurisdiction to review and determine the correctness of the judgment of the original reviewing court on matters of law and fact, with power to reverse an order which is not supported by any reliable, probative and substantial evidence in the record. Such is the specific language of OHIO REV. CODE § 119.12.

[15] For a similar holding, see Burkhart v. Dep't. of Liquor Control, 144 N.E.2d 282 (Ohio Ct. App. 1956).

[16] Queen City Valve, Inc. v. Peck, 161 Ohio St. 579, 120 N.E.2d 310 (1954).

*Bureau of Unemployment Compensation*,[17] a claimant who had been denied an award failed to make the base period employer a party and also to mail the employer a copy of the notice of appeal within 30 days after receiving the Board's decision. Compliance with these statutory requirements was held jurisdictional. It is likewise necessary that the appellant from an adverse court decision reviewing an administrative agency, observe the rules of the court of appeals on the filing of an assignment of error and brief to avoid a dismissal of his appeal.[18]

Perfection of the appeal from a decision of the Industrial Commission in a workmen's compensation claim serves to deprive the Industrial Commission of jurisdiction for any other proceeding while the common pleas court is considering the certified record and transcript.[19]

## Scope of Review Under Ohio Administrative Procedure: Acting on the Entire Record

*Andrews v. Board of Liquor Control*[20] held that the amended provisions of Section 119.12, Ohio Revised Code, provided for a judicial review more extensive than a consideration of questions of law but somewhat short of a complete trial de novo. Two Franklin County Court of Appeals decisions provide additional insight into the meaning of this review by the court of common pleas. *Burger v. Board of Liquor Control*[21] points out that *Andrews* case holds that the review in the common pleas court is a modified trial de novo, and it is error for the court to hear the appeal as upon questions of law without considering the evidence in the record. While it is the duty of the court to sustain the administrative order when supported by reliable, probative and substantial evidence, and in accordance with law, *Petropulos v. Board of Liquor Control*[22] points out that the common pleas judge must review the record and such additional evidence as he may authorize admitted at the hearing, and make a finding that the order is supported by reliable,

[17] 145 N.E.2d 415 (Ohio Ct. App. 1956).

[18] Ray v. Bd. of Liquor Control, 145 N.E.2d 417 (Ohio Ct. App. 1952). The administrative agency was the appellant and sought to show mitigating circumstances for its failure to comply and further that its delay would not cause interruption in the orderly hearing of cases before the court. Appellee's motion to dismiss was granted.

[19] The common pleas court could not remand the record to the Commission for the taking of additional testimony. Firth v. Industrial Comm'n., 145 N.E.2d 215 (Ohio Ct. App. 1957).

[20] 164 Ohio St. 275, 131 N.E.2d 390 (1955). Also see comment, 1956 Survey, 8 WEST. RES. L. REV. 247, 248 (1957).

[21] 141 N.E.2d 671 (Ohio Ct. App. 1956).

[22] 141 N.E.2d 768 (Ohio Ct. App. 1956).

probative, and substantial evidence. This necessitates an actual appraisal of the evidence as to its probative character, the weight given to it and the credibility of the witnesses.

As previously indicated, an administrative agency may appeal from the decision of the common pleas court only when it puts in issue some question of law relating to the constitutionality, construction or interpretation of statutes and rules and regulations of the agency, but once the appeal is properly taken, the court of appeals has jurisdiction to pass upon the questions of law presented and determine the correctness of the judgment of the court that the order of the agency is or is not supported by any reliable, probative and substantial evidence.[23] The appeal from the court of common pleas to the court of appeals is governed by the statutes relating to appeals in civil cases.[24]

## *Evidence*

As previously indicated the appeal from an administrative agency decision under Section 119.12, Ohio Revised Code, is as a modified trial de novo in the common pleas court in which the judge must consider the evidence in the record and find that the order is supported by reliable, probative and substantial evidence, not merely that there is such evidence in the record from which the agency could have found as it did.[25]

Of the common pleas decisions considered in this study, there are several examples of decisions reversing[26] as well as sustaining[27] the orders of the agency on the issue of adequate evidence. There seems to be a

[23] Katz v. Dep't. of Liquor Control, 166 Ohio St. 229, 141 N.E.2d 294 (1957).

[24] OHIO REV. CODE, § 119.12. This section incorporates by reference the appeals provisions set forth in OHIO REV. CODE, §§ 2505.01-.45.

[25] See cases cited in notes 21, 22, *supra.*

[26] Kostecki v. Bd. of Liquor Control, 139 N.E.2d 493 (Ohio C.P. 1956); Mangold v. Bd. of Liquor Control, 145 N.E.2d 500 (Ohio C.P. 1956); Collinwood Slovenian Home Co. v. Bd. of Liquor Control, 144 N.E.2d 912 (Ohio C.P. 1956); Khoury v. Bd. of Liquor Control, 141 N.E.2d 792 (Ohio C.P. 1957).

[27] Hanigosky v. Bd. of Liquor Control, 144 N.E.2d 351 (Ohio C.P. 1956); Khoury v. Bd. of Liquor Control, 141 N.E.2d 787 (Ohio C.P. 1957).

[28] For example, the opinion of Judge Bartlett, in Mangold v. Bd. of Liquor Control, 145 N.E.2d 500 (Ohio C.P. 1956), contains the following paragraph: "The Court, on consideration of the entire record, fails to find that the order of said Board is supported by reliable, probative and substantial evidence; and, therefore, reverses said order and sustains the appeal therefrom."

Compare two common pleas opinions supporting decisions affirming the orders of the Board, rendered prior to the Supreme Court decision in the *Andrews* case, *supra* note 20: Kleinman v. Dep't. of Liquor Control, 140 N.E.2d 77 (Ohio C.P. 1954); 111 Bar, Inc. v. Bd. of Liquor Control, 143 N.E.2d 494 (Ohio C.P. 1955). In the latter decision, the opinion of Judge Marshall contains the following paragraph: "We believe that the order of the Bd. of Liquor Control is supported by reliable, probative and substantial evidence, and is in accordance with law. . . ."

more critical attitude[28] in the common pleas decisions since the decision of the Supreme Court in *Andrews v. Board of Liquor Control.*[29]

On appeal from the common pleas court to the court of appeals, the latter has a dual task when the trial judge has conscientiously applied Section 119.12. Before proceeding further, it must determine that the common pleas judge has considered the whole record and exercised his judgment in arriving at his decision,[30] and if it appears that this has been done, it must then examine the record to determine whether there is reliable, probative and substantial evidence upon which the judge could base the decision he reached.[31] The court of appeals decisions reviewed in this study indicate a very careful consideration of the correctness of the decision of the trial judge, and while the affirmances predominate,[32] there were several reversals because of insufficient evidence.[33]

When the common pleas court finds that the record supports the agency decision, it has no jurisdiction to modify the agency order.[34]

### *Review of Agencies Governed by Other Statutes*

Since several important state administrative agencies are not governed by the Administrative Procedure Act,[35] the scope of judicial review of many administrative decisions must be determined from the basic statutes applying to each agency or department of the state or local government. The following cases involved judicial review of administrative action not governed by the Procedure Act.

*State v. Harrell*[36] held that the action of a city manager and the city civil service commission in discharging a city employee would not be disturbed when the charges made were sufficient for dismissal and there was sufficient evidence in support of the charges. The Supreme Court

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[28] See note 20, *supra.*

[30] Petropulos v. Bd. of Liquor Control, 141 N.E.2d 768 (Ohio Ct. App. 1956).

[31] Andrews v. Bd. of Liquor Control, 164 Ohio St. 275, 280, 131 N.E.2d 390, 393-94 (1955); 1956 Survey, 8 WEST. RES. L. REV. 247, 248 (1957).

[32] National Fraternal Order of Draftees v. Bd. of Liquor Control, 139 N.E.2d 106 (Ohio Ct. App. 1953); Mullins v. Bd. of Liquor Control, 139 N.E.2d 870 (Ohio Ct. App. 1954); 111 Bar, Inc. v. Bd. of Liquor Control, 144 N.E.2d 305 (Ohio Ct. App. 1956); Liberty Club v. Bd. of Liquor Control, 144 N.E.2d 115 (Ohio Ct. App. 1956).

[33] Bd. of Liquor Control v. Walnut Cafe, 139 N.E.2d 55 (Ohio Ct. App. 1953); Kosick v. Bd. of Liquor Control, 140 N.E.2d 62 (Ohio Ct. App. 1955); Brenner v. Bd. of Liquor Control, 101 Ohio App. 550, 140 N.E.2d 626 (1955).

[34] Delmonte Cafe, Inc. v. Dep't. of Liquor Control, 141 N.E.2d 889 (Ohio Ct. App. 1956).

[35] OHIO REV. CODE, § 119.01.

[36] 166 Ohio St. 437, 143 N.E.2d 577 (1957).

will neither weigh the evidence nor substitute its judgment for that of the administrative officers and the lower court.

Under the Ohio workmen's compensation statutes and the rules of the Industrial Commission, a district board of claims has the responsibility for deciding questions of fact relative to disputed claims, and the Industrial Commission on appeal must accept the finding of the board unless it appears that the award, order or decision is clearly against the weight of the evidence or contrary to law. It is an abuse of discretion for the Industrial Commission to modify the board's award unless either one or both conditions exist.[37]

*State v. Corrigan*[38] involved judicial review of a decision of the trustee of the police relief and pension fund of the City of Cleveland refusing benefits to a radio operator. State statutes vested authority in the trustees to make rules and regulations for the distribution of the fund, including the qualifications of beneficiaries. For a number of years, the trustees had construed the board's rules as excluding persons of the class to which the relator belonged. In denying a writ of mandamus, the court of appeals found that the board did not act arbitrarily or abuse its discretion, and the court chose the uniform construction of the rules followed by the trustees.

*City of Gallipolis v. State*[39] involved a decision of the Water Pollution Control Board, created under the Water Pollution Control Act of 1951,[40] denying renewal of a permit to discharge untreated sewage into the Ohio River. The court of appeals affirmed the order of the Board, holding that a court may not substitute its judgment for that of the agency when the decision of the agency is supported by substantial evidence and made in accordance with law.[41]

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[37] State v. Industrial Comm'n. of Ohio, 144 N.E.2d 117 (Ohio Ct. App. 1956). The court of appeals allowed a writ of mandamus to compel reinstatement of the original award in this case.

[38] 140 N.E.2d 40 (Ohio Ct. App. 1957). The court's opinion contains the following significant paragraph:

> While construction given to rules and regulations by boards of this character is not conclusive upon courts, nevertheless it is entitled to weight and consideration; and the practical interpretation placed upon these rules and regulations by board members whose duty it is to administer and enforce them, should not be lightly discarded.

[39] 103 Ohio App. 197, 145 N.E.2d 237 (1957).

[40] OHIO REV. CODE, §§ 6111.01-.07.

[41] It should be noted that OHIO REV. CODE § 6111.06 provides that all proceedings of the Water Pollution Control Board are subject to and governed by § 119.01-.13, the Ohio Administration Procedure Act. The principal case does not discuss the role of the common pleas court in considering the appeal from the board, previously discussed in this article.

## Public Utilities Commission Action

Judicial review of the action of the Public Utilities Commission covers both rate making and service orders.

In the fixing of rates the Commission exercises a legislative function, and upon an appeal to the Supreme Court, the sole issue is whether the Commission has exercised proper judgment.[42] When the Commission has exercised its delegated authority in accordance with the legislative standards for its guidance, and the delegation by the General Assembly does not exceed its authority, the Supreme Court cannot find that the order of the commission is either unreasonable or unlawful and must therefore affirm it.[43]

*New York Central R.R. Co. v. Public Utilities Commission*[44] reiterates that the Supreme Court will not substitute its judgment on questions of fact for that of the Commission, and the record must show that the order of the Commission is against the manifest weight of the evidence or is otherwise unlawful or unreasonable, otherwise the order will be affirmed. Thus, the service order will be affirmed when there is ample competent evidence in the record to support and justify it.[45] As the Supreme Court said in *Southern Ry. System v. Public Utilities Commission*,[46] the order will be affirmed when it is not manifestly against the weight of the evidence.

## Non-statutory Methods of Judicial Review

*State v. Corrigan*[47] invoked the writ of mandamus as a method of determining the validity of administrative action. Under Section 2731.05, Ohio Revised Code, the writ of mandamus will not lie where there is a plain and adequate remedy in the ordinary course of the law. This in-

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[42] Industrial Protestants v. Public Utilities Comm'n., 165 Ohio St. 543, 138 N.E.2d 398 (1956). An effort was made in one case to connect the validity of Public Utilities Commission rules with compliance with the rule making procedure of the Ohio Administrative Procedure Act. Its inapplicability to the Commission is obvious from a reading of OHIO REV. CODE § 119.01, but the Supreme Court felt it necessary to so hold expressly in Akron & Barberton Belt R.R. Co. v. Public Utilities Comm'n., 165 Ohio St. 316, 135 N.E.2d 400 (1956).

[43] Citizens Gas Users Ass'n. v. Public Utilities Comm'n., 165 Ohio St. 536, 138 N.E. 2d 383 (1956).

[44] 166 Ohio St. 113, 139 N.E.2d 623 (1957).

[45] Ohio Central Telephone Corp. v. Public Utilities Comm'n., 166 Ohio St. 180, 140 N.E.2d 782 (1957).

[46] 166 Ohio St. 240, 141 N.E.2d 149 (1957).

[47] 140 N.E.2d 40 (Ohio Ct. App. 1957). For discussion, see note 38, *supra*.