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Administrative Law and Procedure

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ADMINISTRATIVE LAW AND PROCEDURE

Delegation of Legislative Power

A Franklin County Court of Appeals decision involved the delegation of authority to the Director of Public Safety to establish traffic regulations. The ordinance of delegation read as follows: "The Director of Public Safety is authorized to place markers, buttons, or signs indicating the course to be traveled by vehicles turning at such intersections or preventing turns at such intersections and such course to be traveled as so indicated may conform to or be other than as prescribed by law or ordinance." Simultaneously with this delegation of authority, the City Council repealed all the ordinances which had specifically enumerated the intersections where either left or right turns were forbidden.

The defendant was prosecuted for making an illegal right turn under this legislative situation. The defendant contended that the delegation of authority did not prescribe a specific standard for the safety director, and he further contended that it was impossible to presume this was intended where the ordinance contained the words "may conform to or be other than as prescribed by law or ordinance." In *City of Columbus v. Dolling*[1] the court concluded that this ordinance failed to establish a policy of fixed standards for the guidance of the administrative officer. It was therefore an improper delegation of legislative power, particularly "since it gives authority to the administrative officer to act beyond the limits of prescribed laws or ordinances."[2] In reaching this decision the court of appeals followed the latest pronouncement of the supreme court, which had indicated that delegation was proper when the legislative body has established a policy and has fixed standards for the guidance of administrative officers.[3]

Procedure Before Administrative Agencies

Agency Jurisdiction

In Ohio, the Public Utilities Commission has statutory jurisdiction over applications for discontinuance of passenger train service. The decisions of the Public Utilities Commission are subject to review only by the supreme court. Thus, the Public Utilities Commission has plenary and exclusive jurisdiction over railroads furnishing service to the public

1. 113 Ohio App. 134, 177 N.E.2d 545 (1961).
2. *Id.* at 136, 177 N.E.2d at 547.
3. Carney v. Board of Tax Appeals, 169 Ohio St. 445, 160 N.E.2d 275 (1959).

and can determine such claims concerning the adequacy of service. This doctrine was applied in *City of Columbus v. New York Central Railroad Company,*[4] wherein the court of appeals held that a common pleas court did not have jurisdiction to interfere with a railroad's discontinuance of passenger service by means of an injunction. The court of appeals held that the common pleas court had no jurisdiction over the subject matter.

In another interesting agency jurisdiction case the Board of Liquor Control had suspended one of several liquor permits held by the licensee. Subsequently, the director of the Department of Liquor Control determined that the order of the Board was improper because all of the permits should have been treated as one, and therefore the director proceeded to suspend the remaining permits. The common pleas court enjoined the director from taking possession of or suspending any of the remaining permits, and this decision was affirmed by the court of appeals. The supreme court affirmed this decision in *Hotel Hollenden, Incorporated v. Crouch,*[5] holding that only the Board of Liquor Control has authority to suspend, and that the Director has no power of supervision over the Board's decisions.

Agency Rule Making

A Hamilton County Common Pleas decision emphasized the importance of strict adherence to the statutory requirements dealing with the publication of notice of proposed rule making.[6] The issue arose over amendments to the Hamilton County Zoning Code which had been adopted by the Rural Zoning Commission following a notice published in a newspaper which did not provide a "summary" of the proposed amendment as required by the Ohio Revised Code.[7] The court held that a summary in the notice was mandatory, that it must be "a short, concise, summing up, which will properly advise . . . of the character and purport of the amendments without the necessity of perusing them at length." This standard was not met, and the enforcement of the amendments was permanently enjoined.[8]

In *Ohio State Federation of Licensed Nursing Homes v. Public Health Council*[9] the plaintiffs sought to prohibit the promulgation of new nursing home regulations by the Public Health Council. The prohibition

4. 112 Ohio App. 314, 172 N.E.2d 138 (1960).

5. 171 Ohio St. 528, 172 N.E.2d 612 (1961).

6. Seylor v. Clark, 175 N.E.2d 881 (Ohio C.P. 1961).

7. OHIO REV. CODE § 303.12.

8. Seyler v. Clark, 175 N.E.2d 881 (Ohio C.P. 1961). The court relied upon a supreme court decision as authority for its holding. See State v. Bettman, 124 Ohio St. 24, 176 N.E. 664 (1931).

9. 113 Ohio App. 113, 172 N.E.2d 726 (1961).

proceeding had been brought in the Franklin County Court of Appeals, and that court had sustained a demurrer to the petition. The supreme court affirmed this decision,[10] holding that the relators had an adequate remedy by appeal under the Ohio Administrative Procedure Act, and if that did not prove adequate, they would then be entitled to equitable relief.[11]

The supreme court assumed in its decision what the court of appeals had already decided, that the Public Health Council is an agency subject to the Ohio Administrative Procedure Act as to its duties connected with the licensing of nursing homes.

One of the objections to the action of the Public Health Council in the court of appeals was a complaint that the Council following the public hearing provided by it during the rule-making procedure, had held operational meetings with its staff to implement the rule-making function, without the participation of other interested persons. The court of appeals felt that such operation meetings as a device to work out the final form of the regulations were not objectionable.

Inspection of Agency Records

The Ohio Revised Code provides that the proceedings of the Registrar of Motor Vehicles are open to the public and that all documents in his possession are public records.[12] The relator sought to inspect and take data from records pertaining to a single motor vehicle registration. This request was denied though made during business hours, and the relator obtained a writ of mandamus in order to obtain the inspection. On appeal the supreme court affirmed, modifying the order to allow a single inspection, as requested by the relator.[13] The court relied on the rule in Ohio that records in the custody of public officials which are designated as "public records" by the legislature are open to inspection to anyone at convenient times, subject only to the limitation that the inspection does not endanger the safety of the records nor unreasonably impede the official custodian in the discharge of his duties. While the statutes governing the conduct of the Registrar of Motor Vehicles delegate to him the power to adopt and publish rules to govern his proceedings, the court held that he may not arbitrarily and completely remove the records in his custody from public inspection.

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10. Ohio State Federation of Licensed Nursing Homes v. Public Health Council, 172 Ohio St. 227, 174 N.E.2d 251 (1961).

11. See OHIO REV. CODE § 119.11 (Supp. 1961). If the remedy by appeal did not prove adequate, an adequate remedy could be provided through an equitable proceeding for an injunction. The writ of prohibition will not issue under these conditions.

12. OHIO REV. CODE § 4507.25 (Supp. 1961).

13. State *ex rel.* Patterson v. Ayers, 171 Ohio St. 369, 171 N.E.2d 508 (1960).

Administrative Investigations

The Ohio Revised Code authorizes the Tax Commissioner to require by order or subpoena the production within this state of any books, accounts, papers, or records kept by any person within or without the state.[14] Pursuant to this statute the Tax Commissioner issued a subpoena to a warehouseman to produce all of its records concerning the names of persons together with the quantities of goods stored there on two specific dates. The warehouseman sought a declaratory judgment that the statute authorizing the subpoena is unconstitutional and that the Commissioner is not entitled to issue the subpoena. The principal argument of the plaintiff seems to have been that the subpoena constituted an unreasonable search and seizure. The court, however, rendered a judgment for the defendant.[15] It upheld the constitutionality of the statute by construing it as limited to investigations and proceedings within the scope of the official duties of the Tax Commissioner. It also decided that there was adequate relevancy to the matter of the discovery of undeclared personal property to prevent the subpoena from constituting an unreasonable search and seizure. Further, there is no authority to indicate that the subpoena must inform the witness concerning the names of persons under investigation.

JUDICIAL REVIEW

Exhaustion of Administrative Remedy

Two cases illustrate the universality of the doctrine that a person who has not exhausted his administrative remedies may not apply directly to the courts for relief.

In *State ex rel. Patterson v. Leighton*[16] the doctrine was applied to justify the denial of a writ of mandamus which had been sought to compel the issuance of a zoning certificate of occupancy. The court of appeals noted, however, that there is an exception to this doctrine in cases in which the constitutionality of a law, ordinance, or administrative regulation or order is attacked.

A common pleas decision[17] illustrates the requirement of exhaustion in workmen's compensation cases. Notice of appeal had been filed from a decision of the Regional Board of Review while an application for reconsideration was pending. Ultimately, the Industrial Commission denied the application, which did give rise to a statutory right of appeal. The appellant, however, chose to proceed under his original appeal, and as a

14. OHIO REV. CODE § 5703.20.

15. Merchandise Warehouse Co. v. Bowers, 173 N.E.2d 728 (Ohio C.P. 1960).

16. 111 Ohio App. 227, 171 N.E.2d 748 (1959).

17. Bunch v. Sanlon, 172 N.E.2d 188 (Ohio C.P. 1959). See also discussion in *Workmen's Compensation* section, p. 549 *infra.*

result his appeal was dismissed because he had not completed his administrative remedy before appealing to the court.

Review Under the Ohio Administrative Procedure Act

Requirement of a Complete Agency Record

A court of appeals decision[18] emphasizes the importance of the agency's compliance with the review requirement under the Ohio Administrative Procedure Act that the agency must certify to the court of common pleas a completed record of the proceedings.[19] This is a mandatory requirement, and a failure by the agency to file the record within the ten-day period will result in judgment for the appellant. Therefore, in this case an order of the State Veterinary Medical Board suspending the license of a practitioner was permanently enjoined because of this failure to comply with the statutory requirement.

Judicial Review of Law and Fact

The usual rule is that the common pleas court will affirm a license revocation or other order if it is supported by reliable, probative, and substantial evidence, and if it is in accordance with law.[20] However, on appeal from the common pleas court to the court of appeals, the latter court has jurisdiction to consider and review the record of proceedings before the agency and before the common pleas court to determine whether the common pleas court has erred in finding that the administrative order is supported by the requisite evidence and is in accordance with law. In the principal case[21] the State Racing Commission had promulgated a rule providing for the revocation of a jockey's license for "improper practice on the part of holder" and "for conduct detrimental to the best interest of racing." The Commission had revoked a particular jockey's license, because the holder had been convicted for petty larceny unconnected with horse racing. The common pleas court had affirmed the order. The court of appeals held that the rule of the Commission was too broad and indefinite to impose a liability which had no direct relationship to the subject being regulated. Therefore it reversed the order revoking the license for lack of proper evidence and legality.

A court of appeals[22] in reviewing a common pleas court decision which was in turn reviewing the decision of an agency pursuant to the

18. Stephan v. State Veterinary Medical Bd., 113 Ohio App. 538, 173 N.E.2d 389 (1960).
19. OHIO REV. CODE § 119.12 (Supp. 1961).
20. Langdon v. Board of Liquor Control, 112 Ohio App. 232, 175 N.E.2d 866 (1959).
21. State Racing Comm'n v. Robertson, 111 Ohio App. 435, 172 N.E.2d 628 (1960).
22. Swallow Bar, Inc. v. Board of Liquor Control, 111 Ohio App. 279, 170 N.E.2d 747 (1960).

Administrative Procedure Act[23] cannot review a factual question, and an appeal which is based on an issue of fact only is subject to dismissal. When the ground of such an appeal is based on questions of law and fact, the appeal will not be dismissed, but it will be reduced to an appeal on questions of law only and considered on that basis.[24] The court of appeals must consider the correctness of the agency's decision on the basis of the record submitted to the court of common pleas. If the latter court finds that the record is deficient, it should take steps to have it corrected rather than affirm the order as appealed.[25] It is the duty of the common pleas and court of appeals to affirm the agency order if it is supported by reliable, probative, and substantial evidence. There is no authority then to change the order. Thus a common pleas court was in error in modifying a penalty imposed by the Board of Liquor Control in a license revocation case. The court of appeals could and did in this case render the judgment which the court below should have rendered.[26]

Review of State Agencies Not Governed by the Ohio Administrative Procedure Act

Procedure on Appeal

One decision in the field of workmen's compensation emphasizes the importance of observing the special statute governing appeals from orders of the Industrial Commission. A notice of appeal was defective in that it failed to give the date of the decision appealed from the regional hearing board. The court of appeals held[27] that the special statutes then in effect[28] controlled all procedure prior to the filing of a petition with the common pleas court, and thus no amendment of the date could be made after sixty days had expired. Had the general civil procedure statutes applied, an amendment could have been made which would have saved the petitioner's standing in court.

Another workmen's compensation case points to the short time period within which an application for reconsideration of a denial of a death benefit must be made. This period is fixed by statute at ten days.[29]

23. OHIO REV. CODE § 119.12 (Supp. 1961).

24. United Ancient Order of Druids v. Board of Liquor Control, 172 N.E.2d 18 (Ohio Ct. App. 1960).

25. Frontier-Embers Supper Club, Inc. v. Board of Liquor Control, 112 Ohio App. 325, 172 N.E.2d 717 (1960).

26. Evans v. Board of Liquor Control, 112 Ohio App. 264, 172 N.E.2d 336 (1960).

27. Gordon v. Young, 173 Ohio App. 379, 173 N.E.2d 373 (1960), *appeal dismissed*, 171 Ohio St. 446, 173 N.E.2d 379 (1961). See also discussion in *Workmen's Compensation* section, p. 549 *infra*.

28. OHIO REV. CODE §§ 4123.51, 4123.519. Section 4123.51 was repealed in 1961 and section 4123.519 was amended in 1961. See OHIO REV. CODE § 4123.519 (Supp. 1961).

29. OHIO REV. CODE § 4123.515 (Supp. 1961).

The supreme court held that the administrator was without jurisdiction to consider the application for reconsideration filed more than ten days after the administrator's original decision.[30]

The steps necessary to appeal from the Public Utilities Commission to the supreme court must be observed very carefully, especially the time limits. Thus a municipality which sought a review of a decision concerning the installation of automatic signals at a grade crossing had its application for reconsideration dismissed[31] because it was not filed within the thirty day statutory period.[32] The Commission has no jurisdiction to consider a late application for a rehearing, and the Commission properly dismissed such a late application.[33]

In *Pennsylvania Railroad Company v. Public Utilities Commission*[34] the court considered the effect of the Commission's failure to act upon a petition for rehearing and the subsequent time in which the complainant has to file notice of appeal from the Commission's order. The Ohio Revised Code provides that a failure to take any action on a petition for rehearing within twenty days constitutes a denial of the petition by operation of law.[35] Thereupon the sixty-day statute[36] for filing notice of appeal begins to run, and unless notice is filed within this sixty days, the supreme court has no jurisdiction to entertain the appeal.

Limits on Court's Authority to Review

In another case the New York Central Railroad Company applied to the Public Utilities Commission for permission to discontinue a freight station as an agency station and to operate it as a prepay non-agency station. This application was denied. The plaintiff properly perfected its appeal and contended that the Commission did not have jurisdiction to deny or prevent a discontinuance. The supreme court held that the plaintiff having invoked the statutes which purported to give the Commission jurisdiction could not be heard to complain of a lack of the Commission's jurisdiction under them.[37]

The Ohio Motor Vehicle Dealers' and Salesmen's Licensing Board

30. State *ex rel.* Howard v. Industrial Comm'n, 171 Ohio St. 447, 172 N.E.2d 1 (1961).

31. Greer v. Public Utilities Comm'n, 172 Ohio St. 361, 176 N.E.2d 416 (1961). The municipality, the city of Kent, had participated in a public hearing granted to the Erie Railroad which was seeking to install these signals.

32. See OHIO REV. CODE § 4903.10 (Supp. 1961).

33. Specialized Trans., Inc. v. Public Utilities Comm'n, 171 Ohio St. 380, 171 N.E.2d 340 (1960).

34. 172 Ohio St. 154, 174 N.E.2d 102 (1961).

35. OHIO REV. CODE § 4903.10 (Supp. 1961).

36. OHIO REV. CODE § 4903.11.

37. New York Central R.R. v. Public Utilities Comm'n, 171 Ohio St. 365, 171 N.E.2d 503 (1960).

revoked a dealer's license on two grounds. One of these charged a violation of a Revised Code section[38] which was in effect a definition. The other charge was supported by some reliable, probative, and substantial evidence. Since there could be no violation of a definition section of the statute, the order was supported by only one ground, and the appellate court remanded the matter to the Board for reconsideration of the penalty.[39] The court further held that neither the common pleas court nor the court of appeals has power to modify the penalty imposed by the licensing board.

Appeals From Local Administrative Agencies

Harris v. Board of Education of Southwestern City School District[40] held that the appeal to the common pleas court from an order of a board of education terminating the contract of a teacher, as provided by the Ohio Revised Code,[41] is not a trial de novo. Under the statute the court examines the transcript and record of the hearing before the Board and holds such additional hearings as it deems advisable, at which time it may consider other evidence in addition to that in the record.

Two court of appeals decisions discussed the proper party to appeal from local zoning decisions. A Hamilton County zoning case[42] limited the parties which can appeal a rezoning decision to owners of the particular area rezoned. They are the only "aggrieved" parties. In a Stark County case a building permit was denied. The court of common pleas reversed the township zoning board, and the board appealed to the court of appeals. The latter court dismissed the appeal, holding that the only party who can appeal is the one whose permit is denied.[43] The court declared that the new general judicial review statute[44] incorporates the definition of a proper party appellant as contained in the Appellate Procedure Act.[45] This appears to be a significant limitation on the effectiveness of sections 2506.01 to 2506.04 of the Ohio Revised Code.

In *Warren v. City of Cincinnati*[46] the court of appeals held that a city civil service commission is not an "aggrieved" party who can appeal

38. OHIO REV. CODE § 4517.01(H) (Supp. 1960).

39. Ron Best Motors, Inc. v. Ohio Motor Vehicle Dealers' and Salesmen's Licensing Bd., 113 Ohio App. 195, 177 N.E.2d 625 (1960).

40. 113 Ohio App. 187, 177 N.E.2d 613 (1961).

41. OHIO REV. CODE § 3319.16.

42. Western Indus., Inc. v. Hamilton County, 173 N.E.2d 143 (Ohio Ct. App. 1960), *appeal dismissed,* 171 Ohio St. 554, 173 N.E.2d 686 (1961).

43. Spencer v. Bd. of Zoning Appeals of Perry Township, 170 Ohio App. 870, 171 N.E.2d 914 (1960).

44. See OHIO REV. CODE § 2506.01 (Supp. 1961).

45. Taylor v. Johnson, 172 Ohio St. 394, 176 N.E.2d 214 (1961).

46. 113 Ohio App. 254, 173 N.E.2d 180 (1959).

from a decision of the court of common pleas modifying a commission order. This case relied heavily upon *DiCillo and Sons v. Chester Zoning Board of Appeals*[47] in deciding that the agency cannot appeal. Also it is a general test of the right to appeal that a party must have suffered some loss to be an "aggrieved" party, and a board or commission is not such an "aggrieved" party.

Review by Mandamus

In a previous survey article[48] there is a statement that the use of the writ of mandamus had been moderately successful in the review of local zoning decisions. Judicial developments in this area now indicate that it will be highly unsuccessful in the future. The Ohio Revised Code provides that: "The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law."[49] Thus if the remedy is plain and adequate, it excludes recourse to the writ of mandamus whether the remedy is equitable, legal, or statutory, and regardless of its origin. The remedial pattern in zoning is statutory, with a resort initially to an administrative body,[50] followed by an opportunity for an appeal to the court of common pleas. The court of appeals dismissed a writ of mandamus seeking to compel a county building inspector to issue a building permit and zoning certificate because of the adequate remedy provided by the combined statutory administrative-judicial review procedure available to the relator.[51]

The supreme court held that the failure of a relator to utilize any of the available statutory methods of securing judicial review was a sufficient ground for the denial of the writ. *State ex rel. Fredrix v. Village of Beachwood*[52] affirmed the denial of the writ by the court of appeals; *State ex rel. Gund v. Village of Solon*[53] was an original action in the supreme court. Both decisions pointed to the remedy by judicial review of final orders of administrative boards of municipalities provided by chapter 2506 of the Ohio Revised Code. In neither instance had the parties resorted to this remedy.

Two other original petitions involving matters within the jurisdiction of state administrative agencies were denied by the supreme court. A mandamus proceeding against the Ohio State Racing Commission was

47. 158 Ohio St. 302, 109 N.E.2d 8 (1952).

48. Culp, *Survey of Ohio Law — Administrative Law and Procedure,* 12 WEST. RES. L. REV. 441, 449 (1961).

49. OHIO REV. CODE § 2731.05.

50. OHIO REV. CODE § 303.15 (Supp. 1961).

51. State *ex rel.* Ricketts v. Balsly, 112 Ohio App. 555, 171 N.E.2d 538 (1960).

52. 171 Ohio St. 343, 170 N.E.2d 847 (1960).

53. 171 Ohio St. 318, 170 N.E.2d 487 (1960).

denied[54] because of the adequate remedy of appeal provided by the Ohio Administrative Procedure Act.[55]

In the other action the relatrix sought to compel a telephone company to provide her with telephone service.[56] This was a matter within the jurisdiction of the Public Utilities Commission which should have been initiated by a complaint which could then be followed by judicial review.[57] In its per curiam opinion the supreme court stated that "the proper method of review of the Commission was by an appeal from an adverse order of the Commission to the common pleas court under Chapter 2506, Revised Code." The quoted statement is very startling and opens up an avenue for the review of state agencies under a statute which was apparently intended to provide a method of judicial review of local and municipal administrative agencies.[58]

Review by Prohibition

The writ of prohibition is not a very useful method of obtaining judicial review of administrative agencies. The relator must show a clear right to this prerogative writ of prohibition, and it is impossible to show this when the relator has not exhausted his administrative remedies. Two cases illustrate this difficulty with the use of the writ of prohibition. In *State ex rel. McMillan v. Dickerson*[59] an original proceeding was instituted in the supreme court to prevent the Regional Board of Review from considering an appeal from the decision of the administrator in a workmen's occupational disease case. The writ was denied because there was no showing that the relator had been or might be injured in view of the possibility of appeal to the Industrial Commission.[60]

In *Gullett v. Klapp*[61] the court of appeals stressed the caution with

54. State *ex rel.* Toledo-Maumee Raceways, Inc. v. Ohio State Racing Comm'n, 172 Ohio St. 109, 173 N.E.2d 347 (1961).

55. OHIO REV. CODE § 119.01-.13.

56. State *ex rel.* Coury v. Ohio Bell Tel. Co., 172 Ohio St. 309, 175 N.E.2d 511 (1961).

57. OHIO REV. CODE § 4905.26.

58. Ohio Revised Code sections 2506.01 through 2506.04 appears to be limited in its application to administrative agencies of local subdivisions of the state and of municipalities. In Vlad v. City of Cleveland, 111 Ohio App. 70, 164 N.E.2d 797 (1960), the third paragraph of the syllabus reads as follows: "The provisions of Ch. 2506, Revised Code, for appeals from orders of administrative agencies, and section 2505.03, Revised Code, for an appeal from a final order, when taken together, afford appeals to the courts from administrative agencies of all political subdivisions of local or state government." Is the Public Utilities Commission an agency of a local subdivision of the state or of a municipality?

It is true that an appeal might be taken under Ohio Revised Code section 2505.03 from an order of the Public Utilities Commission unless Ohio Revised Code section 4903.12 provides the exclusive remedy for reviewing orders of the Commission issued under section 4905.06.

59. 172 Ohio St. 288, 175 N.E.2d 176 (1961).

60. The court also might have added that there is judicial review available from an adverse decision of the Industrial Commission. See OHIO REV. CODE § 4123.519 (Supp. 1961).

61. 112 Ohio App. 542, 172 N.E.2d 738 (1960).