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Cooper, State Administrative Law

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BOOK REVIEWS

DRAFTING A UNION CONTRACT. By LeRoy Marceau. Boston: Little, Brown and Company. 1965. Pp. 321. $12.50.

Drafting a Union Contract is a unique handbook that should be of vital interest to all practicing labor law specialists. It is written by a leading labor relations expert, whose background includes experience as a representative in collective bargaining matters of unions, federal and state governments, and management. The book will thoroughly instruct both union and management draftsmen in the skills so vital to the preparation of the successful labor contract.

Mr. Marceau, who is a member of the New York and Ohio Bars, has designed this book to aid all individuals who are responsible for drafting the union contract, regardless of the "side" they represent in the negotiations, or their position within the organizational hierarchy. The author discusses the essential background information needed by the draftsman, the necessary tools that the draftsman must utilize for the successful performance of his task, and the practical techniques of drafting which must be brought into play in the course of preparing a union contract. Mr. Marceau observes that expertise in draftsmanship can prevent any number of disputes which would otherwise require resolution by arbitration, litigation, or the exercise of economic power. The aim of the draftsman, he states, is to prevent the contract from becoming a "trackless jungle" in which lurk the dangers of conflicting provisions of omissions, vagueness, and error. He notes that "the draftsman's function is to prevent rather than to resolve labor disputes. If he performs his functions well, very few disputes will arise; and he will prevent literally scores of disputes for every one that the employer and union resolve by arbitration, litigation and economic strength" (p. 6).

The draftsman prevents disputes by making sure that the employer, the union, and the men all understand the contract to mean the same thing. Mr. Marceau describes the entire contract drafting process with exactness, commencing with the assigning of the responsibility to draft a union contract to an individual in the organizational structure and culminating with the signing of the end product by the representatives of labor and management. He delineates the precise topics that each draftsman must carefully note if he is to prepare a successful agreement. The many areas of drafting that the

author comments upon include style, vocabulary structure of the contract, description of job classifications, places of work, work schedules, supervisory positions, working time, rates of pay, remuneration, and the settlement of disputes.

This book contains reliable information and should be most helpful to practicing labor lawyers. The author writes with a clear style and describes every potential issue which could conceivably confront the draftsman of the labor contract. The text is weak in only one respect — the author fails to refer to the developing body of labor law relating to the labor contract, *i.e.*, the various court and National Labor Relations Board decisions regarding the use of certain clauses or terminology, the notices to be served regarding the renewal or termination of the contract, and the enforcement of rights of the parties under the contract. Perhaps Mr. Marceau will see fit to include this data in his next book on labor law.

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STATE ADMINISTRATIVE LAW. By Frank E. Cooper. New York: Bobbs-Merrill Company. 1965. Two Volumes. Pp. v, 951. $30.00.

The law relating to administrative agencies developed as a result of an increasing governmental commitment to administrative control. This commitment was evidenced by an increase in the issuance of licenses for trades, businesses and professions, and by a corresponding rise in the number of rules and regulations promulgated by administrative agencies. Since administrative law was created by existing agencies which were formed under different statutes and confronted with specific problems, it is not surprising that the law lacked uniformity.

Through an arrangement between the American Bar Foundation and the University of Michigan Law School, Frank E. Cooper was selected to lead a research project in the area of administrative law. Mr. Cooper is well known for his knowledge, experience, and writings in the administrative law field. When the project was completed it was copyrighted by the American Bar Foundation in 1965.

The treatise accomplishes at least two definite objectives: (1) It presents a comprehensive text covering the subject, including the theories and decisions presently existing in our states; and (2) It

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acquaints lawyers and legislators with the Revised Model State Administrative Procedure Act (RMSAPA) which was created by the Conference of Commissioners on Uniform State Laws in 1961 as a uniform guide. Mr. Cooper has skillfully utilized the RMSAPA to solve some of the problem areas. The format consists of the history, theory, practical considerations, and definite trends of administrative law as shown by state and federal court decisions. On occasion the Federal Administrative Procedure Act is utilized as an illustration or as demonstrative of a trend.

The discussion of state administrative law is opened by a review of the historical doctrine of separation of powers. The federal constitution is interpreted as creating a system of checks and balances on the three divisions of the government, *i.e.*, the legislative, the executive, and the judicial. In order to operate efficiently, administrative agencies must contravene the basic principle of this governing theory. Statutes creating an agency for a prescribed purpose must endow the agency with the capacity of being an administrator of a legislative grant of power, a prosecutor of alleged violations, an adjudicator of disputes, and a legislator of rules and regulations. This raises the problem of the constitutional limitations on the delegation of legislative and judicial power. Early court decisions developed tests for determining the validity of such legislative grants of power. One of the better known of these approaches is the "true test" rule which is used to distinguish between "the 'truly' legislative or judicial powers, which could not be delegated, and those merely 'administrative' powers which could be entrusted to agencies" (p. 48).

Mr. Cooper questions the usefulness and validity of the "true test" and other approaches as an answer to the problem and states:

> It was for a long time maintained both by eminent textwriters and by the courts that legislative powers cannot be delegated to administrative tribunals. Similarly, it was long asserted with equal vigor that the legislature is powerless to delegate judicial duties to administrative officers. But candor compels recognition of the hard fact that these statements have become mere shibboleths, shattered by the hard course of decision — reverently repeated, but not followed in practice (pp. 46-47).

Court decisions have indicated definite tendencies toward allowing broad discretionary powers to agencies when dealing in the area of public health, safety or morals (p. 85) and limiting the discretionary powers where substantial property rights are involved (p. 79). At present the state courts have adopted

> the view that [the] combination of legislative, prosecutory, and adjudicatory functions in a single agency will be countenanced where a practical necessity therefor exists, but only so long as workable checks and balances (such as reservation of superintending control in the legislature, or the availability of reasonably broad judicial review) exist to guard against the abuses of administrative discretion. In the absence of such safeguards, the state courts are still prepared to strike down statutes which grant an agency powers so unlimited as to enable the agency in practical effect to displace the legislature and the courts (p. 17).

The greater part of this two volume work is devoted to an in-depth discussion and analysis of administrative law problems. The largest problem area arises from what the RMSAPA defines as a contested case: " '[C]ontested case' means a proceeding, including but not restricted to rate making, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing" (p. 804). Mr. Cooper exhaustively covers this area and presents the problems which arise beginning with the proceedings before trial, and continuing through the subjects of necessary parties, the right to counsel, the hearing proper, and the post hearing issues, such as sufficiency of the findings of the administrative agency or board, and the necessity of incorporating in the findings the basic facts adduced from the evidence at the hearing.

The theory of res judicata as it applies to a "contested case" is discussed as far as possible under the limited present court decisions and interpretations. In reference to a tax case, Mr. Cooper states that

> there would seem to be no question but that a determination of the amount of tax due in a particular year is res judicata on the question of tax liability for that year. In fact, no cases have been noted in the state courts in recent years where the taxing agency asserted a different position (p. 513).

He also observes that at times,

> after a ruling has been made the tax commission changes its construction of the statute and seeks to impose its new interpretation retroactively with respect to years intervening between the date of the original ruling and the date of the new one. On this question, the clear trend in the state court decisions is to hold that retroactive application will not be permitted (p. 513).

In other areas of law where agencies exist, such as workmen's compensation, the theory of res judicata must be interpreted with a view toward the continuing jurisdiction retained by the agency over the injured employee. The presence of new or changed conditions which arise subsequent to an order, or the progressive disability of

the injured party are examples of factors considered by the agency in its continuing jurisdiction. Mr. Cooper does not cover this particular matter, but because of the broad scope of the work, it could not be expected to cover every agency in every detail.

Review of or appeal from the decision of an administrative agency also presents problems. First, there is the question of requesting an order staying execution, or an application for relief pending an appeal. Second, where a statute authorizes an appeal it usually provides a method. By way of illustration, Mr. Cooper cites a survey in Michigan made some years ago which noted that the Michigan statutes provided for ten methods of appeal dealing with only eight state agencies which adjudged cases for appeal to courts (p. 603). In those circumstances the general trend is that on appeal there must be strict adherence to the method prescribed by the statute. Under the RMSAPA the purpose seems to be to provide a guide to a simple method of review applicable to all agencies (p. 607).

Volume two of this work incorporates the Revised Model State Administrative Procedure Act in its entirety with comments in the Appendix (p. 803). An alphabetical listing of state statutes which have used the RMSAPA as a guide is also provided (p. 881). In addition, it provides a complete table of cases with references to the pages of the text at which they are cited.

From an over-all viewpoint, this two-volume work seems to be most comprehensive and definitely informative in outlining the problems and common questions that arise and that must be answered in the practice before administrative agencies. This is the type of work that can be used as a quick reference manual for a beginning search in the field of administrative law. The chief criticism that can be made of this treatise is that at times for the sake of brevity, and in an attempt to cover the whole area of administrative law, Mr. Cooper has had to skim over the problems and cite the major trend, so that in these areas the text must be taken as the author's opinion which has been based on general principles of administrative law rather than on the law of any particular jurisdiction. However, even with this slight deficiency, the treatise should be of considerable help to administrative agencies, lawyers, and legislators.

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