Louisiana Law Review

Volume 21 | Number 2
The Work of the Louisiana Supreme Court for the 1959-1960 Term
February 1961

Public Law: Administrative Law

Melvin G. Dakin

Public Law

ADMINISTRATIVE LAW

*Melvin G. Dakin**

The Louisiana Supreme Court has frequently announced that it will permit no derogation from either the letter or the spirit of the civil service laws, the objective of which is "to secure . . . [public career employees] in a permanent status of Civil Service position." So, in *Young v. Charity Hospital of Louisiana at New Orleans*,[1] a dismissal attempt which was defective for lack of proper written notice could not be rendered effective to start the time limitation on appeals by curative steps later taken. "Nullities" established in the interest of individuals might be susceptible of ratification but not "nullities" in derogation of public order and good morals; the latter are absolute and void *ab initio*.[2] In two cases[3] reaching the court during the last term, this principle was given a curious new twist by an imaginative Civil Service Commission. It refused to dismiss an appeal, although not timely filed, because the statute under which mandatory retirements were effected was alleged to be unconstitutional; the statute providing for mandatory retirement for employees reaching the age of sixty-five and insured under federal social security law was said to exceed constitutional power by adding as a new cause for mandatory removal a cause which did not exist under well defined judicial meaning.

Pretermitting the intriguing inquiry into this inversion of judicial and legislative power, the court held that its statement in *Young* had to do with attempts to cure procedural defects and since there were none here, the limitation on appeals would run.[4] However anxious an administrative tribunal might be to reach a constitutional issue, it could not nullify safeguards designed to insure prompt litigation of issues by holding that the mere allegation of a constitutional issue freed the allegor from the restraints of prescription in pursuing his remedy.[5]

*Professor of Law, Louisiana State University.

1. 226 La. 708, 77 So.2d 13 (1954).
2. *Id.* at 714, 77 So.2d at 15.
3. Chadwick v. Department of Highways, 238 La. 661, 116 So.2d 286 (1959); Purdy v. Department of Revenue, 238 La. 673, 116 So.2d 290 (1959).
4. 238 La. 661, 668-69, 116 So.2d 286, 288-89 (1959).
5. *Ibid.*

The case of *Department of Institutions v. Day*,[6] decided with the *Young* case in 1954, was also deemed inapplicable; it was ruled unnecessary, in connection with a mandatory separation from service, for an employing department to acknowledge a statement from an employee being separated since such a statement is not a voluntary resignation such as required acceptance in *Day* in order to start prescription running on an appeal to the Civil Service Commission.[7] Prescription here began to run from the date of separation from the service specified in the notice of mandatory removal.

Fallon v. New Orleans Police Department[8] presented, among other points, an interesting argument based on *Slochower v. Board of Higher Education of New York City*.[9] A dismissal after full hearing based on refusal to answer questions in a prior bribery investigation was urged as a denial of due process of law and an abridgement of the privileges and immunities of a citizen of the United States. But *Slochower* did not hold unconstitutional the drawing of inferences from failure to answer questions as such; it held unconstitutional summary dismissal from a state job solely because of failure to answer questions before a federal committee.[10] In *Fallon*, there was apparently full opportunity for the dismissed officer to explain his failure to answer, and the questions refused were in any event intimately related to the work of the officer.[11] *Slochower* was deemed by the court not "apposite." Other grounds urged were also rejected and the rulings of the city Civil Service Commission affirmed.

In *Hearty v. Department of Police, City of New Orleans*,[12] the city Civil Service Commission made another attempt to recapture discretion to attach terms and conditions to its orders of reinstatement, but the attempt was again turned back and adherence affirmed to the line of jurisprudence begun with *Boucher v. Heard*;[13] in the event of an unlawful dismissal, no order of reinstatement from the Commission is required and

6. 228 La. 105, 81 So.2d 826 (1955). Both the *Young* and *Day* cases are commented on in *The Work of the Louisiana Supreme Court for the 1954-1955 Term — Administrative Law*, 16 LOUISIANA LAW REVIEW 282-85 (1956).
7. 228 La. 105, 110-12, 81 So.2d 826, 828 (1955).
8. 238 La. 531, 115 So.2d 844 (1959).
9. 350 U.S. 551 (1956).
10. *Id.* at 558-59.
11. 238 La. 531, 546-47, 115 So.2d 844, 849-50 (1959).
12. 238 La. 956, 117 So.2d 71 (1960).
13. 228 La. 1078, 84 So.2d 827 (1956).

hence no terms and conditions, such as denying back pay or offsetting wages earned elsewhere against such back pay, may be attached by the Commission. As has been noted,[14] handing down findings of fact and conclusions of law by the Commission that a dismissal is illegal are to suffice as authority for restoration to a departmental payroll. In *Hearty*, a dismissal had been based on the fact of indictment by a federal grand jury for making false statements without "any inquiry as to the 'reasonableness, truth or weight of the accusation' "; this was not deemed to constitute legal suspension after hearing and upon a finding of illegality by the Commission, " '[the employee] became entitled as a matter of course and *without an order of the Commission* to receive his regular salary.' "[15] (Emphasis added.) One may now speculate whether, assuming such a charge was not sustained *after hearing*, a commission order could be accompanied by terms and conditions or whether it too would now be a case in which "the exaction of the law has not been fully observed" and hence civil service status "never legally suspended or terminated." The emasculation of administrative discretion to attach terms and conditions, a discretion seemingly provided in the Constitution, would then be practically complete.[16]

In *State* ex rel. *McAvoy v. Louisiana State Board of Medical Examiners*,[17] the court reaffirmed its position that "there is no natural or absolute right to practice medicine or surgery" in Louisiana.[18] Consequently, the applicant was held "not entitled to a contradictory hearing before the Board."

Actually, the hearing afforded the applicant comes within the requisites of fair procedure deemed necessary by the United States Supreme Court in denying a professional license; in *Goldsmith v. United States Board of Tax Appeals*,[19] the Court directed that an applicant "should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer."[20]

Here, the applicant furnished the Board with references as

14. *The Work of the Louisiana Supreme Court for the 1958-1959 Term — Administrative Law*, 20 LOUISIANA LAW REVIEW 268, 270 (1960).
15. 238 La. 956, 961, 117 So.2d 71, 73 (1960).
16. See Justice McCaleb dissenting in Hermann v. New Orleans Police Department, 238 La. 81, 104, 113 So.2d 612, 620 (1959).
17. 238 La. 502, 115 So.2d 833 (1959).
18. *Id.* at 529, 115 So.2d at 843.
19. 270 U.S. 117 (1926).
20. *Id.* at 123.

to good character but prior to a Board meeting at which the application and references were to be considered, the Board Secretary was prompted to make further inquiry. Thereafter, at the hearing, applicant was apparently afforded full opportunity to explain derogatory information which came to the Board but failed to explain it satisfactorily; the Board concluded "it was not satisfied that relatrix was of good moral character" and denied a license.

The court limited its review to determining "whether the Board abused its discretion in refusing the application . . . and whether or not it deprived her of due process of law by conducting the hearing . . . improperly and illegally."[21] Having considered the record, the court found the Board had not abused its discretion in concluding as it did. While indicating that "the *holder* of a license has a property right which cannot be curtailed or revoked, save for causes prescribed by law . . . on charges formally made and heard contradictorily," the court concluded that "an *applicant* for a license is not entitled to a hearing before the Board."[22] (Emphasis added.) Rather than thus relying so greatly upon judicial review as a check upon administratrive arbitrariness, the court might have affirmed the hearing afforded as satisfying fair procedure; in *Perpente v. Moss*,[23] an opinion often approvingly cited, a New York court has said that "a license may not be refused on the ground that the applicant 'is not a person of good character' unless the applicant has fair opportunity to meet a challenge to his good character *and* unless the court of review is apprised of the basis for the finding against the applicant."[24] (Emphasis added.)

LOCAL GOVERNMENT LAW

*Henry G. McMahon**

ORDINANCES

The "Gas Sign Ordinance," which appears to have been spreading like a rash throughout the municipalities of the country in the last few years, was held unconstitutional in two cases

21. 238 La. 502, 510, 115 So.2d 833, 836 (1959).
22. *Id.* at 530, 115 So.2d at 844.
23. 293 N.Y. 325, 56 N.E.2d 726 (1944).
24. *Id.* at 329, 56 N.E.2d at 727.

*Professor and sometime dean, Louisiana State University Law School.