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Melvin G. Dakin

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*Melvin G. Dakin**

CIVIL SERVICE

This term was the first in which the courts of appeal were afforded an opportunity to exercise their newly acquired jurisdiction over direct appeals from the Civil Service Commissions of the state and of the City of New Orleans.[1] Limitation of the review to questions of law, previously a matter of constitutional provision,[2] is now accomplished under rules of court.[3]

In the main, the cases presented issues as to whether findings were supported by evidence; while it would sometimes appear that the courts are reviewing these findings broadly under a "clearly erroneous" rule,[4] or at least to the degree permitted under the "substantial evidence" rule,[5] the rule articulated continues to be that "the findings of fact by the Civil Service Commission where supported by *any* evidence is binding upon . . . [the] court and cannot be disputed."[6]

Hays v. Louisiana Wild Life and Fisheries Commission[7] presented for judicial clarification a matter of considerable importance in the interpretation of the immunity provision applicable to civil service proceedings; it provides an interesting footnote to the *Reed* case,[8] which reached the court some two years ago.

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*Professor of Law, Louisiana State University.

1. In 1958, Article 7, Section 10 of the Louisiana Constitution of 1921 was amended so as to specify cases appealable directly to the Supreme Court; since appeals from the Civil Service Commissions were not included in the specification, Article 14, Section 15(o)(1) originally providing for such appeals has been held impliedly repealed and all appeals perfected subsequent to July 1, 1960 transferred to the docket of the appropriate court of appeal. Hughes v. Department of Police, 131 So. 2d 99 (La. App. 4th Cir. 1961); Burton v. Department of Highways, 135 So. 2d 588 (La. App. 1st Cir. 1961).

2. LA. CONST. art. 14, § 15(o)(1).

3. Uniform Rules of the Courts of Appeal, rule XVI(A).

4. See Comment, *Administrative Law — Substantial Evidence on the Record Considered as a Whole*, 12 LA. L. REV. 290, 299 (1952).

5. *Id.* at 294.

6. Knight v. Department of Inst., 140 So. 2d 485, 486 (La. App. 1st Cir. 1962).

7. 136 So. 2d 559 (La. App. 1st Cir. 1962).

8. Reed v. Louisiana Wildlife and Fisheries Commission, 235 La. 124, 102 So. 2d 869 (1958).

The Wild Life Commission dismissed Hays after he had testified in Reed's behalf that double reimbursement for travel from both federal and state governments had been obtained by himself and others as well as Reed; the immunity rule[9] under which he testified was said to protect him only against disciplinary action based solely on the fact that he testified.[10] The Civil Service Commission upheld this interpretation;[11] in the court of appeal's view, however, to hold that the rule "protected the employee only from disciplinary action based on his having testified and not from the content of such testimony is . . . tantamount to declaring the rule totally meaningless and without effect."[12] The court of appeal consequently reversed the commission and ordered Hays reinstated. The Supreme Court granted certiorari and affirmed the judgment,[13] noting by way of clarification that an employee was protected from the content of coerced testimony only in the sense that the statements there made as to unlawful act could not themselves be used as evidence of the act but that, if otherwise proved, the act testified to could be the basis of disciplinary action; as Justice McCaleb rather laconically put it, "the rule protects relator from being discharged merely because he admitted he did what Reed did but not because he did what Reed did."[14]

UNEMPLOYMENT COMPENSATION

The courts of appeal announced several decisions involving administrative action under the unemployment compensation provisions; in the main, decisions of the administrative agency were attacked on the ground that findings of dismissal for misconduct or findings of leaving employment without good cause were unsupported.[15] The courts of appeal are guided, in review of such decisions, by a statutory directive that "the findings of the board of review as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction

9. Civil Service Rules, art. 13.25(b): "Any officer or employee required to testify as herein authorized shall not be subjected to any disciplinary action by his appointing authority because of his giving such testimony."

10. 136 So. 2d at 560.

11. *Id.* at 561.

12. *Id.* at 565.

13. Harp v. Louisiana Wildlife and Fisheries Commission, 243 La. 278, 143 So. 2d 71 (1962).

14. *Id.* at 73.

15. E.g., Green v. Brown, 136 So. 2d 147 (La. App. 3d Cir. 1962); Friloux v. Administrator, Div. of Empl. Sec., 136 So. 2d 99 (La. App. 4th Cir. 1962).

of the court shall be confined to questions of law."[16] Such conclusiveness will be accorded to findings, however, only if there has been a fair hearing with the employee having notice of the specific conduct relied upon to establish ineligibility; in the misconduct cases, for example, the misconduct charged must be the misconduct finally relied upon by the Board of Review to sustain its determination.[17]

As to the evidence necessary to sustain a finding of fact, the unemployment compensation statute was amended in 1958 to require "sufficient evidence."[18] Previous to the amendment, the "supported by legal, competent, and sufficient proof";[19] whether the legislature meant not to limit evidence to "legal or competent" evidence by including only "sufficient" in the amendment is not clear. The courts of appeal continue to apply their requirement of findings "supported by legal, competent, and sufficient proof."[20]

On questions of law, the courts of appeal have felt entirely free to substitute judgment for the agency on interpretation; "misconduct," for example, has been interpreted to require "more than mere inefficiency, or unsatisfactory conduct . . . on the other hand, the repeated and deliberate violation . . . of an employer's reasonable instructions may be disqualifying conduct . . . as may be a single deliberate violation of a safety rule which endangers the lives of co-employees and the property of the employer."[21]

In the Third Circuit, suits seem to be brought against the administrator personally, whereas in the Fourth Circuit suits are styled against the holder of the office of administrator; the latter would seem preferable in order to avoid problems of abatement which have arisen in the federal courts.[22] The Federal Rules have recently been amended to avoid cases of extreme hardship in which failure to timely file motions to substitute defendants have resulted in the suit abating.[23]

16. LA. R.S. 23:1634 (1950).
17. Johnson v. Brown, 134 So. 2d 388, 390, 391 (La. App. 3d Cir. 1961).
18. LA. R.S. 23:1634 (1950) as amended by La. Acts 1958, No. 523.
19. Burge v. Administrator, Div. of Empl. Sec., 83 So. 2d 532, 533 (La. App. 2d Cir. 1955).
20. Huddleston v. Brown, 124 So. 2d 225, 226 (La. App. 2d Cir. 1960).
21. Turner v. Brown, 134 So. 2d 384, 387 (La. App. 3d Cir. 1961).
22. Snyder v. Buck, 340 U.S. 15 (1950).
23. FED. R. CIV. PROC. 25(d).

SCHOOL BOARDS

In the school board cases that come to the courts of appeal, the statutory restraints on judicial review are not present to the same degree as in civil service and unemployment compensation cases. The district court must conduct a "full hearing to *review* the action of the school board," but it can hear evidence in addition to the record evidence before the school board if the petitioning teacher chooses to introduce it.[24] On appeal to a court of appeal, review is also on law and fact, since the statute granting review of school board action does not make the agency's determination final in any respect.[25] However, one court of appeal has deemed itself bound by the rule set forth in the *Lewing* case[26] providing that "when there is rational basis for an administrative board's discretionary determinations which are supported by substantial evidence insofar as factually required, the court has no right to substitute its judgment for the administrative board's or to interfere with the latter's bona fide exercise of its discretion."[27] We have no indication yet what the formula will yield when there is not "substantial" evidence; in federal agency review, the Supreme Court has said that "if the findings of the [agency] . . . are supported by [substantial] evidence the courts are not free to set them aside, even though the [agency] . . . could have drawn different inferences. . . . The possibility of drawing either of two inconsistent inferences from the evidence did not prevent the [agency] . . . from drawing one of them."[28] Under this rule, mere disagreemnt with the agency's findings will not suffice if the agency's discretion has been validly exercised in choosing between two conclusions, each of which has persuasive support; the agency must have chosen a conclusion which does not have persuasive support for the court to interfere under the substantial evidence rule as so interpreted.[29]

While the district court hearing seems more important in the school board cases than in the unemployment compensation cases, since additional evidence may be taken under the school board statute, it seems arguable that direct appeal to the courts

24. Lewing v. DeSoto Parish School Board, 238 La. 43, 113 So. 2d 462 (1959).
25. LA. R.S. 17:443 (1950).
26. 238 La. 43, 113 So. 2d 462 (1959).
27. Singleton v. Iberville Parish School Board, 136 So. 2d 809, 814 (La. App. 1st Cir. 1962).
28. NLRB v. Nevada Consol. Copper Corp., 316 U.S. 105, 107 (1942).
29. Comment, 12 LA. L. REV. 290, 300-01 (1952).

of appeal, with the possibility of certiorari to the Supreme Court, might in both types of cases be appropriately considered; in this regard, the civil service pattern of review, bypassing the district courts, seems to be functioning satisfactorily and is presumably conserving both judicial and lawyer time.

PUBLIC SERVICE COMMISSION

The expanded jurisdiction of the courts of appeal over review of administrative action does not include appeals from orders of the Public Service Commission; the recent constitutional amendment, which so substantially altered the flow of appellate work into the courts of appeal, left undisturbed the progression of review from the Commission through the district court to the Supreme Court.[30] One of the reasons may have been that at the district court level the case may be tried de novo, although usually confined to evidence introduced before the Commission;[31] new evidence, unless stipulated to the contrary by the parties, must be referred to the Commission for consideration in relation to the order under review before a district court may proceed to judgment.[32] Increasingly, however, trial court proceedings have tended to consist of review on the record as made before the Commission but, of course, with full substitution of judgment possible under a statute which permits the court to "affirm the order of the Commission . . . or . . . change, modify, alter, or set it aside, as justice may require."[33]

Recent action by the Supreme Court in a "station-closing" case from the Commission would seem to strengthen further the role of the trial court as an appellate tribunal rather than as a trier of fact in any original sense.[34] The action in question was a remand from the Supreme Court directly to the Commission for the purpose of taking further evidence in a "station-closing" case;[35] the trial court was simply reversed and not otherwise included in the directive although, since the case was not held on the docket of the Supreme Court, it would presumably return to the district court on subsequent appeal from any new Com-

30. LA. CONST. art. VII, § 10(3), as amended by La. Acts 1958, No. 561, adopted Nov. 4, 1958.
31. LA. R.S. 45:1192 (1950).
32. *Id.* at 45:1194.
33. E.g., Southern Bell Tel & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 15 P.U.R.(3d) 328 (Dist. Ct. 1956).
34. Gulf, Col. & Santa Fe Rwy. Co. v. Louisiana Pub. Serv. Comm'n, 243 La. 290, 143 So. 2d 75 (1962).
35. 143 So. 2d at 79.

mission order. The remand was ordered under the authority of Article 2164 of the Code of Civil Procedure, providing: "The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." There was no disagreement among the court as to the remand procedure; only the substantive need for it was questioned, on the ground that no sufficient case had been made for the inadequacy of the present record and the consequent need for the taking of further evidence.[36]

With the role of the trial court thus firmly delineated as primarily appellate in Commission cases, one may speculate whether another constitutional amendment may not be in order, shifting Commission appeals from the trial court to the appropriate court of appeal, with only supervisory and certiorari jurisdiction in the Supreme Court. Since the direct supervisory power of the appellate courts to stay orders would not extend to Commission orders, injunctive relief and hence resort to the district courts would still be occasionally necessary; however, review of a considerable array of administrative orders would seem feasible by appeal directly from the Commission to the appropriate court of appeal as in the case of Civil Service Commission matters.

ALCOHOLIC BEVERAGE CONTROL BOARD

The power of the supervisory writ was well illustrated in a recent Board of Alcoholic Beverage Control case coming up to the First Circuit Court of Appeal.[37] The legislature has provided that permit revocation orders of both municipal governing bodies and Board of Tax Appeals may be appealed to a district court only devolutively; thereafter if a district court refuses relief, a further devolutive appeal is provided to the appropriate court of appeal.[38] However, if writs are applied for, the revocation may be stayed, pending consideration by the court of appeal, thus achieving a suspensive appeal despite the statute.[39]

In the case under review, the proprietress of a tavern had

36. *Id.*, Justice McCaleb dissenting, at 80.
37. Allen v. Louisiana Board of Alcohol Beverage Control, 141 So. 2d 680 (La. App. 1st Cir. 1962).
38. LA. R.S. 26.302, 33:4788 (1950).
39. 141 So. 2d at 681.

her liquor license revoked by municipal authorities;[40] she nonetheless successfully achieved a stay of the revocation pending determination of the constitutionality of the statute conferring revocation powers.[41]

The case is significant also for reaffirming an important point of enforcement practice, namely, that the legality of a revocation does not become moot upon the expiration of the permit year.[42] Here, the proprietress, after achieving a stay of the revocation of her current permit, despite denial of instant relief by the trial court, routinely applied for issuance of license and permit for the following year. The Louisiana Board of Alcoholic Beverage Control, alerted to the city's revocation move, countered by setting a hearing at which proprietress was charged with defending her right to maintain her licenses and permits. Proprietress then went to a district court and successfully enjoined the Board from holding its hearing pending the outcome of the revocation proceedings. She moved to dismiss the appeal taken by the Board on the ground that, since the year had expired which the revoked license had covered, the hearing order was moot. The court of appeal refused to dismiss, noting that expiration of the year covered did not moot the issue since, under the statute,[43] an applicant for a permit may not have had a previously-held permit revoked within one year prior to the application; thus failure successfully to defend her license against revocation for the expired year could be a determining factor in obtaining a renewal of the license for the subsequent year.[44]

Here, again, as in the school board and public service commission cases, one can speculate whether direct review of the board's orders by the court of appeal, encompassing as it does review of both law and fact, and subject as it is to certiorari from the Supreme Court, would provide adequate safeguards, without the present provision of a trial de novo at the district court level.

40. LA. R.S. 33:4785 (1950).
41. 141 So. 2d at 681.
42. *Id.* at 682.
43. LA. R.S. 26:79A(6) (1950).
44. 141 So. 2d at 681, 682, citing Barretta v. Cocrehan, 210 La. 55, 26 So. 2d 286 (1946).