Public Law: Administrative Regulation, Law and Procedure

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The decision in *Louisiana State Pharmaceutical Ass'n v. Louisiana Board of Pharmacy* leaves a rather puzzling hiatus in the judicial review of administrative action in this area. At least since 1948, the legislature has indicated that only graduates of approved colleges of pharmacy may be applicants for licenses. However, if the Board through mistake or as a result of misrepresentation to it, licenses an applicant who is not such a graduate are there now means available for rectifying the error? In this case, the alleged fact that the licensee was not such a graduate was brought to the attention of the Board but without effect. Thereupon, the moving party—the Pharmaceutical Association—sought a writ of mandamus which would require the Board to hold a hearing, a writ which the district court issued. The Board, represented by the Attorney General, appealed the case to the First Circuit Court of Appeal; the decision was reversed, and the writ ordered recalled on the ground that the action sought to be mandated was not ministerial. It was said that action mandated must be “purely ministerial in nature, and . . . so clear and specific that no element of discretion is left in their performance.” Since the statute had not specifically set out failure to be a graduate of an approved college of pharmacy as a basis for revocation, the duty of the Board was not “clear and specific.” However, the Association was only asking that a hearing be held, a duty which seems clear and specific enough where revocation of a license is to be considered. The discretion

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1. 153 So. 2d 514 (La. App. 1st Cir. 1963).

2. La. Acts 1948, No. 469, La. R.S. 37:1179 (1950). “[T]he Board is not vested with discretion [to grant a license] in the matter unless the applicant for registration is able to show that he has complied with the requirements set out in the law. . . . [T]he one applying had to show that he was a graduate of ‘an accredited school or college of pharmacy’ that was recognized by the Board of Pharmacy of this State.” *La. Board of Pharmacy v. Smith*, 226 La. 537, 547, 76 So. 2d 722, 726 (1954), commented on in *16 La. L. Rev. 285* (1956).
of the Board would seem involved only at the point where it determined whether the conduct was such as to warrant revocation. If, for example, the probability of fraud on the Board existed, the Board would have clear power to consider this as a basis for revocation since "qualification . . . obtained by fraud" is clearly stated as a cause for revocation. The decision seems to cut off judicial intervention in an area where it might better be available.

**Board of Optometry Examiners**

Can an administrative agency accomplish by regulation what the legislature has specifically refused to do by statutory amendment? *Mitchell v. Board of Optometry Examiners* seems to so hold. Licensed optometrists have for many years been permitted to practice their profession in the employ of a corporation. In 1956, the legislature was asked to outlaw the practice but refused to amend the statute. Thereafter, the Board adopted a regulation forbidding practitioners from accepting corporate employment, doing so under a general rule-making power exercised "for the purpose of administering the provisions of this Chapter." Such employment was by rule deemed to be having "a professional connection with . . . an illegal practitioner" and hence in violation of the act. The district court found the grant of rule-making power an inadequate basis for what it termed a "rule of substantive law regulating the practice of optometry." On appeal, however, one judge dissenting, the Third Circuit Court of Appeal analyzed the statute, found a general legislative purpose to proscribe the corporate practice of optometry, and upheld the rule.

Judge Tate sagely observed that corporate employment of practitioners of optometry is not synonymous with licensing a corporation to practice optometry. He would have held the Board to the "settled construction" which it had given an ambiguous statute for many years, particularly in the light of an amendment with an opposite content having been rejected by the legislature. As matters now stand, if the legislature would

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4. 146 So. 2d 863 (La. App. 3d Cir. 1962).
5. Id. at 870.
6. Id. at 865, 867.
7. Id. at 869.
8. "Administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is in-
permit the employment of licensed practitioners by a corporation, it must do so explicitly. A writ of review has issued.⁹

In another case,¹⁰ the Third Circuit Court of Appeal upheld the Board’s authority to suspend a certificate for a period of thirty days, on the basis of a violation of a proscribed unethical practice under La. R.S. 37:1061(14). The court rejected a plea that the Board should have issued rules and regulations covering the specific violations prior to charging the certificate-holder. The court cited no precedent for its holding but it would appear to be readily sustained since the statute is clear enough in its description of the category of conduct proscribed to permit the necessary inferences to be drawn (and judicially reviewed) establishing the conduct proved as within the conduct proscribed by the statute.¹¹ No issue was made of the fact that there are no standards in the statute for the Board’s exercise of discretion in fixing the length of the period of certificate suspension; there is an interesting parallel here in the similarly uncontrolled judicial discretion in fixing penalties for some crimes.¹²

**REAL ESTATE BOARD**

The statute providing for regulation of real estate brokers provides for suspension or revocation of a license for, among other causes, “conduct which demonstrates unworthiness, incompetency, bad faith or dishonesty,”¹³ but no guidance is given the Board as to when suspension or revocation shall be the appropriate remedy. The statute also provides for pervasive judicial review of the law and the facts, the relatively unusual provision being made that “findings of fact of the board shall not be conclusive.” (Emphasis added.)¹⁴ No mention is made, as in the Federal Rules, of giving “due regard . . . to the opportunity of the . . . [trier of the facts] to judge of the credibility of the witnesses.”¹⁵ *Willis v. Louisiana Real Estate Board*¹⁶ might be read as illustrating the need for such guidance. The Board heard

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¹². 2 Davis, Administrative Law § 15.02, at 349 (1958).
¹⁶. 146 So. 2d 237 (La. App. 2d Cir. 1962).
evidence which to them apparently demonstrated bad faith, and on the basis of which the broker's license was unqualifiedly revoked. Yet the evidence also indicated, and the court of appeal found, that "even if the facts had been misrepresented this was corrected and an agreement was reached." Unqualified revocation thus precipitated bitter litigation and the resulting necessity for a court of appeal to redetermine credibility of a witness on a "cold" and obviously confused record. One is left with the impression that misunderstanding there was, very possibly deliberately generated, but subsequently cleared up. The Board, on its part, was evidently acting on a finding of misrepresentation; the court of appeal seems strongly influenced by the fact that any misrepresentation which might have been made was cleared up "before the offer was finally accepted." In these circumstances, a suspension of license for a limited period might have been accepted as an appropriate warning.

STATE EMPLOYMENT RETIREMENT SYSTEM

An important interpretation of system obligation in connection with the exercise of options by applicants was made during the term in St. John v. Board of Trustees. Applicant retired on June 30, 1961, applied on July 7, 1961, for the option of a reduced allowance to be paid to a survivor for life in the event of applicant's death, and died on July 16, 1961. The statute provided that such an option should be effective thirty days after application. The System counsel argued that this provision deferred any effectiveness to the option selected until August 7, 1961, thirty days after application. The court of appeal held the meaning of the statute to be that the option was timely exercised and hence valid but that effectiveness was delayed in the sense that benefits thereunder were withheld until thirty days after application to permit processing of the application and calculation of the benefits due thereunder.

ALCOHOLIC BEVERAGE CONTROL

Last term, the First Circuit Court of Appeal refused, on the basis of an argument of mootness, to dismiss an appeal from a district court order enjoining the Board from holding a license

17. Id. at 238.  
18. 150 So. 2d 328 (La. App. 1st Cir. 1963).  
20. 150 So. 2d at 331.
The issue was deemed not moot, even though the year had expired for which the license was requested, because a refusal of a license could still be used against a potential licensee in a subsequent year. However, when the court of appeal later reached the merits, the district court order was annulled and set aside on the ground that, by specific statutory provisions, the courts have been proscribed from preliminary interference in Board hearings; judicial review may be obtained, by devolutive appeal, only from "a decision of the board to withhold, suspend, or revoke a permit."

A point of some interest as to who may be a protestant against the location of a bar was settled in Xavier University v. Thigpen. Licensee objected that Xavier University was not a "citizen" permitted under the statute to file "a sworn petition requesting that a permit be suspended or revoked." But the Fourth Circuit Court of Appeal was of the opinion that "citizen" in the statute was used in a broad rather than a restricted sense so as to include incorporated schools as well as individuals; this was said to be so in view of the fact that the limitation on locations of bars adjacent to schools was "literally created . . . in order to protect institutions of the kind operated by" Xavier University.

UNEMPLOYMENT COMPENSATION

The Third Circuit Court of Appeal, in McGinnis v. Moreau, adds its opinion to the jurisprudence as to the meaning of a 1958 amendment to the unemployment compensation statute which requires findings of fact to be supported by "sufficient" evidence. The Second Circuit has held that, when the legislature added the modifier "sufficient," it thereby meant "legal, competent, and sufficient"; the Third Circuit now adds its authority

22. Id. at 682. The case is commented upon in 23 LA. L. REV. 369, 370 (1963). Cf. Di Giovanni v. Parish of Jefferson, 151 So. 2d 528 (La. App. 4th Cir. 1963), where mandamus issued directing the parish to issue a 1962 liquor license. The parish appeal was dismissed by the court on the ground that the issue was moot by virtue of the calendar year 1962 having expired.
23. Allen v. Board of Alcoholic Beverage Control, 146 So. 2d 662 (La. App. 1st Cir. 1962).
25. 151 So. 2d 550 (La. App. 4th Cir. 1963).
26. Id. at 552.
27. 149 So. 2d 188 (La. App. 3d Cir. 1963).
to this pronouncement. However, the legislature did not in fact specifically require more than "sufficient" evidence, and until it does, or until the Supreme Court evidences agreement with the circuit courts, it would seem that the provision is still open to the construction that evidence which does not satisfy the exclusionary rules of evidence appropriate to a jury trial may nonetheless be admissible and usable by an agency in making a finding of fact. This suggestion is supported by the fact that, when the statute was amended in 1958, the provision that "hearings . . . shall be in accordance with regulations prescribed by the board of review . . . whether or not such regulations conform to the usual rules of evidence" was left unchanged. In Lee v. Brown, the Third Circuit interpreted this to mean that "although normally inadmissible evidence may be received at the hearing, the actual findings of the administrative agency . . . must be supported by competent evidence . . . . The relaxation of the general rules of evidence does not mean that the administrative tribunal can treat as evidence matter which is not evidence and has no probative force, and it does not justify orders without a basis in evidence having rational probative force. Findings of fact supported only by incompetent or hearsay evidence are improper, and hearsay evidence will not be considered in determining whether the findings are supported by the evidence. . . ." It seems at least open to question whether the legislature deemed hearsay evidence as improper; one may well ponder the point of admitting hearsay (except to avoid debate over the exclusionary rules) if no use is to be permitted to it. A few jurisdictions have permitted findings to be rested on corroborated reliable hearsay, particularly where the corroborating evidence is competent and where an unwitnessed industrial accident may have left little else on which to base a decision.

As to scope of review, the Third Circuit states that it will not determine the preponderance of evidence but only its "sufficiency," which latter is deemed to be "evidence reasonably tending to sustain . . . [a] finding or . . . evidence from which an inference of the fact found could fairly be drawn." It is also approvingly stated that "administrative determinations of fact

32. Id. at 324.
33. 2 DAVIS, ADMINISTRATIVE LAW § 14.06, at 279 (1958).
are conclusive unless wholly without evidential support.” When applied together, these precepts seem to provide a pattern of review under which one may perhaps “weigh the evidence” without seeming to; a finding may be supported by evidence “reasonably tending to sustain” it; yet, if the evidence is in part hearsay, even corroborated and reliable hearsay, such evidence may be rejected as not competent. The result may then be that the evidence remaining is insufficient “to sustain” a finding; and the contrary finding may be “sustained” by competent evidence although rejected by the agency. If the court does not remand but adopts the contrary finding rejected by the agency, has it determined the “preponderance of the evidence” issue?

It has been suggested that the 1958 amendment “may have been intended as a thrust in the direction of the ‘substantial evidence’ rule” since “sufficient” evidence might be construed to mean evidence sufficient to persuade a reasonable mind. Recent statements of the Second and Third Circuits indicate that they might be moving beyond this limited meaning of the “substantial evidence” rule to its full meaning, since both courts have stated with approval that “when the evidence produced at a hearing before an administrative agency is open to various constructions, the reviewing court must accept the finding of the agency.” This could be read to mean that where there is persuasive, i.e., “sufficient” evidence to support two inconsistent inferences, the agency decision will not be disturbed on review. However, as was noted, the Third Circuit Court reserves the possibility of reducing persuasion to non-persuasion by rejecting non-competent evidence which may have been relied upon by the agency. Thus, that court notes that “we cannot question the findings of fact by the board where such is supported by evidence entitled to judicial acceptance.”

35. Ibid.
36. In Lee v. Brown, 148 So. 2d 321, 325 (La. App. 3d Cir. 1962), where the court did remand the case to the agency, it said, “... we have concluded that this is one of those relatively rare instances where a remand for additional evidence should be ordered, rather than a decree that the claimant should receive benefits because the employer did not produce sufficient competent evidence at the hearing to prove disqualification.” (Emphasis added.)
40. 148 So. 2d at 327.
ently remanded a case for insufficient evidence where an applicant was unrepresented by counsel at the agency hearing and failed (through misunderstanding) to develop crucial evidence bearing on the unsuitability of a job to which she had been referred; the agency had rejected her application on the basis of her failure to apply.\footnote{41}  

In \textit{Green v. Brown},\footnote{42} involving an alleged refusal to accept suitable employment, the applicant's evidence was conflicting as to her response to a job referral, and the referee resolved the credibility issue against the applicant, refusing unemployment compensation benefits. The Second Circuit Court of Appeal reversed, noting that the applicant was the only witness and that her testimony was unrebutted, even though conflicting. The court, having full review of law and fact, could undoubtedly resolve the credibility issue for itself, even though on a "cold" record; is it required, however, that the agency put in rebuttal testimony in order to question the credibility of the applicant? As to the burden of proof in such cases, to what extent is the claimant the "proponent of the rule," and to what extent the agency, so as to be charged with bearing the burden of making a preponderating affirmative case?\footnote{43} If an employer intervenes in proceedings to contest the payment of benefits to a former employee, it is said that he must "prove his contention that the claimant is disqualified from receiving benefits."\footnote{44} Where there is no protesting employer but where the agency is disposed to dispute the claim, must the agency then assume the burden? The Second Circuit has said as to an applicant that "when he submitted his claim for unemployment compensation it was incumbent upon him to establish a prima facie case showing entitlement to the benefits claimed."\footnote{45} The implication would seem to be that the burden of proving ineligibility thereafter is on  

\footnotesize{41. Immel v. Brown, 143 So. 2d 156, 158-60 (La. App. 3d Cir. 1962).  
42. 147 So. 2d 406 (La. App. 2d Cir. 1962).  
43. In the Federal Administrative Procedure Act, 5 U.S.C.A. § 1006(c), "the proponent of a rule or order shall have the burden of proof." The Committee interpretation of this language is that it "means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain." Sen. Doc. No. 248, 79th Cong., 2d Sess., 208, 270 (1946).  
44. 148 So. 2d at 323.  
45. Chapman v. Division of Employment Security, 104 So. 2d 201, 203 (La. App. 2d Cir. 1958). A commentator suggests that a prima facie case is made at the point where applicant has given answers favorable to his receiving benefits and his answers have been accepted by the agency representative. 10 LA. L. REV. 448, 453 (1959).}
the attacker, whether an intervening employer or the agency itself. If so, the agency must show by evidence that an applicant failed to follow up job referrals and refused suitable employment unjustifiably, at least if the agency expects its rejection of the claim to be sustained in court.\textsuperscript{46} \textit{Green v. Brown}\textsuperscript{47} seems to say this.

In \textit{Jackson v. Division of Employment Security}\textsuperscript{48} an unsuccessful attempt was made to extend to a district court judgment a statutory provision which precludes the administrator from taking a suspensive appeal from an adverse decision of an administrative board of review without its consent.\textsuperscript{49} The provision alluded to precludes the administrator from penalizing a claimant, successful before the board of review, with a suspensive district court appeal. The Fourth Circuit holds that an \textit{unsuccessful} claimant before the agency who persuades a district court to order payment of benefits may have his court order suspended pending conventional judicial appeal according to the usual rules governing such appeals.\textsuperscript{50} The Fourth Circuit also adopted, last term,\textsuperscript{51} the rationale of an earlier Third Circuit opinion\textsuperscript{52} holding that severance pay is properly included in wages deemed earned during the period of active employment and not the period subsequent thereto. Thus, an employee can qualify for unemployment benefits, chargeable against the employer, during the period of weeks following termination of employment when he is presumably sustaining himself on severance pay. Such pay is not deemed remuneration for services during that period, and he is thus within the statutory definition that one "shall be deemed to be 'unemployed' in any week during which he performs no service and with respect to which no wages are payable to him."\textsuperscript{53} The interpretation may well have its effect at the bargaining table when the union will be seeking to retain and expand severance pay benefits.

\textsuperscript{46} Id. at 453. "[T]he burden of proving his ineligibility shifts to the party attacking the claim." And see Foster v. Department of Public Welfare, 144 So. 2d 271, 275 (La. App. 1st Cir. 1962), holding that "although the burden as to the facts is on appellant [employee], such burden does not exist until such time as the Commission places in the record some evidence to support its findings of fact."

\textsuperscript{47} 147 So. 2d at 407.

\textsuperscript{48} 147 So. 2d 29 (La. App. 4th Cir. 1962).

\textsuperscript{49} \textit{LA. R.S. 23:1635} (1950).

\textsuperscript{50} 147 So. 2d at 31.

\textsuperscript{51} George v. Brown, 144 So. 2d 140 (La. App. 4th Cir. 1962).

\textsuperscript{52} Swift & Co. v. Brown, 132 So. 2d 508 (La. App. 3d Cir. 1961).

\textsuperscript{53} \textit{LA. R.S. 23:1472(19)} (1950).
In *Dameron-Pierson Co. v. Bryant and Brown*, an ingenious device for liquidating employee damages to an employer's property received a judicial construction maximizing its value to employers. The provision partially reimburses employers for property damage resulting from employee misconduct by cancelling that employee's wage credits. The First Circuit ruled that such cancellation was mandatory upon the administrator if the employer successfully opposed his employee's claim for benefits; the relief comes to the employer without further action on his part.

During the term, there were a number of cases appealed involving questions of both fact and law as to whether misconduct had been proven within the meaning of the statute. An employer was also sustained in the position that he did not maintain a "lockout" in answer to a wildcat strike but that he simply refused to schedule additional work until a new contract, with adequate "no strike" safeguards, was negotiated; pending settlement of this issue, a "labor dispute," within the meaning of the statute, was deemed to be going on and precluded benefits to participating union members.

**CIVIL SERVICE COMMISSIONS**

In *Bonnette v. Louisiana State Penitentiary*, the First Circuit had occasion to apply the salutary interpretation of the Supreme Court that:

"... if the evidence preponderately shows that the appointing authority would not have taken the disciplinary action except for political or religious reasons or prejudices, it would be proper, and, in keeping with the Commission's functions and duties, for it to reverse the dismissal or other disciplinary action, provided it felt that the assigned cause was not of such a serious nature as to endanger the efficiency of the service."

The First Circuit added further gloss by stating affirmatively that if the employee alleges and proves the action was predi-

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54. 148 So. 2d 388 (La. App. 1st Cir. 1962).
57. 148 So. 2d 92, 99 (La. App. 1st Cir. 1962).
icated upon discrimination or other illegal or improper motives rather than upon the assigned charges, "it ... then becomes the duty of the Commission to determine whether the charged misconduct is so detrimental to the efficiency of the service that the action of the appointing authority is justified and will be allowed to stand."

A departmental maneuver which could have led to substantial inroads on an employee's right to review of dismissal action was checked by the First Circuit in Washington v. Confederate Memorial Medical Center after approval by the Civil Service Commission. The court held that a dismissal letter as to which defects had been waived and an appeal filed with the Commission could not be nullified and the appeal mooted by a second dismissal letter purporting to cure prior defects. The employing agency did not recall the first letter but simply admitted its invalidity, after the appeal period had run on the second presumably valid letter of dismissal.

In Paternostro v. New Orleans Police Department, the New Orleans Civil Service Commission had sought unsuccessfully to assume the role of an appellate review tribunal rather than a trier of the fact. The appellate court ruled that the Commission must make its own independent findings of fact and may not rest on the fact that a dismissing agency "had substantial evidence before ... [it]." As approvingly quoted by the court, "The Commission abdicates its function of review if it states, without itself finding that the cause for discharge does in fact exist, that there was evidence before the appointing authority from which the latter might have concluded that cause for discharge existed." In Wilson v. New Orleans Police Department, it was also noted that, even though the burden of proof is on the appellant employee before the Commission, "it is still incumbent on the commission to make an independent determination of the facts on which the dismissal is based."

Wild Life and Fisheries Commission staged what would ap-

59. 147 So. 2d 923 (La. App. 1st Cir. 1962).
60. Id. at 925.
61. 146 So. 2d 812 (La. App. 4th Cir. 1962).
63. 145 So. 2d 660, 662 (La. App. 4th Cir. 1963), cert. denied.
pear to be the final judicial skirmish in its resistance to the claims for back pay of a reinstated employee.64 The Commission was ordered to include in the back pay all "across the board" increases granted in the interim of contesting the dismissal, as being included in "emoluments, rights and benefits" flowing from recognition of permanent status.65 A claim for inclusion of merit step increases was referred to the Civil Service Commission for a showing that denial of such merit step increases constituted a prohibited discrimination.66 Should the Commission order the inclusion of such increases in the back pay award, Wild Life and Fisheries could, of course, appeal such action, so that further litigation is perhaps not quite foreclosed.

During the course of the term, a number of appeals came up from the Commission on inadequacy of findings. However, since the appellate courts are precluded from substituting judgment on the facts,67 a factual issue can be reached only if a necessary finding has not been made68 or if a finding has been made but on the basis of no evidence.69 On the other hand, "any question of law" is open to review on appeal, including of course an administrative interpretation of the meaning to be attached to an administrative regulation.70

SCHOOL BOARDS

In Tichenor v. Orleans Parish School Board,71 the Fourth Circuit Court of Appeal rejected a plea of bias as invalidating dismissal action of a school board, noting that the board is the only public body authorized to act in dismissal proceedings against a teacher and hence necessity compels its action even in the face of a showing of prejudice.72 The board was upheld on

65. Id. at 564.
66. Id. at 565.
67. LA. CONST. art. XIV, § 15(O)(1).
68. Hollis v. Confederate Memorial Medical Center, 148 So. 2d 381 (La. App. 1st Cir. 1962).
70. Scallan v. Department of Institutions, 143 So. 2d 160 (La. App. 1st Cir. 1962).
71. 144 So. 2d 603 (La. App. 4th Cir. 1962).
the merits, in its dismissal of a teacher on the basis of continuing refusal to observe a regulation that supervisory and consulting personnel be permitted to visit his classroom and render assistance in improving techniques and procedures. 73

The Lafayette Parish School Board was reversed in its attempt to base a dismissal on evidence which could have been, but was not, relied upon to subject a teacher to an earlier demotion to a new and lower paid position. 74 The court ruled that such evidence was irrelevant to the later dismissal proceedings from the new position; new charges, relevant to performance in the new position, must be brought. 75 Since the school board had earlier demoted the teacher without sustaining charges, it was also required to continue salary at the rate payable in the old position. 76

PUBLIC SERVICE COMMISSION

Rate Regulation

During the term, an important rate regulation case 77 was reviewed by the Supreme Court and resulted in the Commission’s determination of cost of money for the utility being overturned, although the differentiated rate of return relied upon in part by the Commission is by no means novel, and results under it have been previously approved by the court. 78 The Commission had found the capitalization of Southwestern States Telephone Company, the applicant, to consist of 45.7% bonds, 15.3% preferred

73. Quoting approvingly from Adler v. Board of Education, 342 U.S. 485, 493 (1952), that “the school authorities have the right and the duty to screen the officials, teachers, and the employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.”


75. Id. at 851.

76. Hebert v. Lafayette Parish School Board, 128 So. 2d 783 (La. App. 3d Cir. 1961). In Rucker v. St. Bernard Parish School Board, 144 So. 2d 481 (La. App. 4th Cir. 1962), the requirement of sustaining charges was further established; an attempt by a school board to dismiss a school bus driver without a recommendation and statement of reasons from the parish superintendent was rejected. The fact that the driver had failed to disclose his occupation as a saloon-keeper and his conviction for selling alcoholic beverages to a juvenile did not prevent a valid contract from being created since no misrepresentation was proved; presumably, conduct subsequent to the employment which would warrant dismissal must be charged in a superintendent’s recommendation, to meet statutory requirements. L.A. R.S. 17:492 (1950).

77. Southwestern States Telephone Co. v. Louisiana Public Service Commission, 150 So. 2d 543 (La. 1963).

78. United Gas Pipeline Co. v. Louisiana Public Service Commission, 241 La. 657, 130 So. 2d 652 (1961); Southern Bell Telephone and Telegraph Co. v. Louisiana Public Service Commission, 232 La. 446, 94 So. 2d 431 (1957), 239 La. 175, 118 So. 2d 372 (1960).
stock, and 39% common equity (paid-in common stock capital plus surplus) and had allotted as the cost of bonds and preferred stock their average contractual rates of 4.24% and 5.59%, respectively. Cost of common equity capital had been arrived at by utilizing market price and earnings data of the applicant, but without consideration of earnings-price data from comparable enterprises having publicly-held common stock; the limited data considered consisted of earnings per share of common stock for a twelve-months test period ending June 30, 1960, and a spot market price per common stock share a few months after the end of the test period. The resulting earnings-price ratio of 6.66% was rounded to 7% and combined with bond and preferred stock costs to yield an over-all composite cost of money of 5.53%. This composite rate was then applied to a property rate base, and a dollar inadequacy in the present return of some $100,000 was the result. The applicant also determined an earnings-price ratio but based it on data drawn solely from its own experience. It tallied up total proceeds from common stock sales over a period of some seventeen years, and determined that the weighted average ratio of applicable earnings to such proceeds was 9.11%. This was, of course, simply a historical average ratio, without recognition of current market appraisals and investor expectations. But utilizing it, the resulting composite over-all cost of money obtained by the applicant was 6.39%.

Thus, while the Commission’s approach was certainly more reflective of current market conditions for the applicant’s common stock, neither Commission nor applicant approach takes account of the Bluefield precept that comparably situated enterprises should be looked to for comparable cost of money data. Typical of such comparative earnings-price data are exhibits submitted in the United Gas and Southern Bell rate litigation.

Even had adequate comparative data been used, however, the method of the Commission evokes some criticism on the

79. 150 So. 2d at 547.
80. Ibid.
81. Ibid.
82. "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 680 (1923).
83. 241 La. at 710, 130 So. 2d at 661; 239 La. at 214, 118 So. 2d at 386.
ground that earnings-price ratios measure cost of common stock capital based on the relationship of earnings per common share to the market value of such shares, whereas the ratio thus evolved is applied to book value of common stock rather than market value. This creates a built-in discounting of the earnings-price ratio since in general, at least in times of prosperity, book values are less than market values. This may be illustrated in the instant decision, where it will be seen that the staff indicate market value per share of $24 for the test date, whereas book value per share is $20.04 as of the end of the test period; a commission-selected earnings-price ratio of 7% will yield less earnings when applied to $20.04 than when applied to $24.00; yet the former is what is done. Even though the process is screened by composite of the 7% common stock rate with senior capital cost of money and application to a property rate base. Further experimentation must thus continue with a view to rendering earnings-price ratios usable even though a substantial disparity exists between the market values from which they are drawn and the book values to which they may be applied; objective comparative market data on the cost of common stock capital is too crucial to a workable application of the Hope principle to be abandoned.

One approach advanced would adjust the selected earnings-price ratio upward by the percentage excess of market value over book value before applying it to book equity on either a direct or composite basis. This approach has been rejected by the Federal Power Commission and by at least one state commission on the ground that it is error to fix a fair rate of return “with a view of maintaining the market value of securities.” On the other hand, the Hope principle requires that rates

85. 150 So.2d at 547, 548.
86. The theory, still widely adhered to, that it is the use of property which must be compensated for, dictates this latter step. In a fair value jurisdiction, this may mean the rate is applied to a substantially larger base than the actual capitalization of the utility; in an original cost jurisdiction, such as Louisiana, the property devoted to public use may actually be less than total capitalization of the utility, as was the case here. 150 So.2d at 548.
87. “[T]he return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks . . . sufficient to assure confidence in the financial integrity of the enterprise . . . to maintain its credit and to attract capital.” Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).
be fixed so as to attract capital; and if a market price must be maintained to accomplish this task, this seems not an inappropriate adjustment.

Another approach in the use of earnings-price ratios is that of adjusting the book value of the common equity by the use of price indices, a process which might or might not equate the common equity with current market evaluation but which could in any event make it a fairer base to which to apply the market’s appraisal of the required reward to investors (the earnings-price ratio) than book value. This method is subject to the criticism that it is a version of the somewhat discredited “fair value” technique, albeit a limited version.

There would appear to be little justification for a comparative composite “6% rule,” such as approved by the court in the instant case in any event, since such a rule takes no account of the debt ratio of the particular utility; the Louisiana Public Service Commission, as well as the Supreme Court, is on record that the subscriber is entitled to the benefits of a capital structure which takes adequate advantage of the tax savings flowing from the use of debt, up to a reasonable amount, as a source of funds.

Certificates of Convenience and Necessity

A term ago, the court had occasion to interpret the meaning of the statutory provision to the effect that “no new or additional certificates shall be granted over a [motor carrier] route where there is an existing certificate, unless it be clearly shown that the public convenience and necessity would be materially promoted thereby.” In the court’s view, this meant that there must be substantial evidence, and not just some evidence, that an additional motor carrier certificate was needed. This term, the Commission refused a certificate in Saia Freight Line v. Louisiana Public Service Commission on the ground that public convenience and necessity did not require the proposed ex-

90. 36 Tul. L. Rev. at 740 n.279 (1962).
91. 229 La. at 192-203, 118 So. 2d at 381-382.
93. 241 La. at 179, 127 So. 2d at 542.
94. 243 La. 787, 147 So. 2d 390 (1962).
tension of service. The court upheld the commission order, noting that no evidence had been adduced showing the "failure, refusal or inability" of the existing certificated carrier to handle the freight. Nor was there any evidence of the inadequacy of existing facilities to service the area.96 Testimony which, in the main, consisted of statements to the effect that the service was needed in the area was not deemed substantial evidence that the public convenience and necessity would be materially promoted.

Station Closing

The now familiar "balancing" formula was again applied, but with opposite results, by the commission and the court in another series of "station closing" cases.96 Despite the fact that the railroad can usually demonstrate an actual out-of-pocket loss on a station operation, the commission takes the position that financial loss alone is not enough to justify discontinuance; in this position the Supreme Court acquiesces but requires that "the public good derived from maintenance of the agency station outweighs the expense to the railroad in continuing such agency."97 The court, in appeals from the commission, is free to substitute its judgment, according "great weight" to the decision of the commission but reversing freely if it is found to be "clearly erroneous and unsupported by the evidence."98 Usually, the proposal to close a station is accompanied by proposed arrangements for handling the business of the closed station at neighboring stations; the court has almost uniformly found the evidence of "need," at best usually a modest showing of inconvenience to a few shippers, and an inadequate showing that "public convenience and necessity will be materially affected." "[T]he probability of future increase in business due to newly developing industries . . . is insufficient."99

A proposed closing of several express offices adjacent to New Orleans was somewhat novel in that it was not pitched squarely on individual station losses but rather on the need to

95. 147 So. 2d at 391.
96. "[T]he test employed in determining whether or not a railroad may properly be entitled to discontinue an agency station, where an absolutely necessary service is not involved, is whether the public good derived from maintenance of the agency station outweighs the expense to the railroad in continuing such agency." The Texas & Pacific Ry. v. Louisiana Public Service Commission, 243 La. 322, 326-327, 143 So. 2d 86, 88 (1962).
97. Ibid.
98. Ibid.
99. Id. at 334, 143 So. 2d at 90.
consolidate stations as a part of an emergency nationwide program of reorganization made necessary "to effect drastic economies and thereby forestall liquidation." After review of the testimony by affected patrons, the court concluded that "plaintiff [express agency] bore its burden of proving that the public convenience and necessity would not be materially affected if its offices in Gretna and Harvey were closed and consolidated with the New Orleans general agency."

**Ad Hoc Rule Making**

In *Louisiana Tank Truck Carriers, Inc. v. Louisiana Public Service Commission*, the Supreme Court sustained an exercise of the *ad hoc* rule-making power of the Commission. Appellees had obtained *ex parte* approval of a rate reduction later admitted to be for the purpose of driving a private carrier out of the business of transporting his own petroleum products. Thereafter, the private carrier applied to the Commission to review this order, and on the basis of its showing, the Commission rescinded the order. On appeal, Louisiana Tank Truck Carriers argued successfully to the trial court that the Commission had no jurisdiction since its power to regulate motor carrier rates extended only to common and contract carriers. Conceding the power of the Commission to rescind its order *ex proprio motu*, the trial judge nonetheless thought the Commission powerless to so act on the application of a private carrier. The Supreme Court rejected the argument, noting that the constitutional grant of authority "to supervise, govern, regulate and control" utilities and to formulate and adopt "rules, regulations and modes of procedure" was sufficiently broad to encompass entertainment of an application for review by a private carrier even though such an application was not explicitly authorized in existing rules and regulations. The legislature in enacting our motor carrier act, the court noted, stated the policy of the act to include commission correlation and coordination of the various transportation agencies using the highways "so the public will be given the benefit of the most economic and efficient

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101. Id. at 557, 145 So. 2d at 33.
102. 155 So. 2d 15 (La. 1963).
103. Id. at 16 n.2.
104. Id. at 16.
105. Id. at 16-17.
means of transportation without discrimination against legitimate forms of transportation" and fostering of "sound economic conditions among all classes of carriers." To accomplish an objective clearly within such legislative intent, the commission could have formulated rules of practice in advance which would encompass the complaint of a private carrier, but even in the absence of such a rule of practice formulated in advance, the commission was recognized as having power to proceed on an ad hoc basis.

The Louisiana Tank Truck Carriers case would seem to dispose of a problem thought to be posed by a decision of the First Circuit last term which, in effect, directed an electric cooperative, exempt from commission regulation, to nonetheless look for relief to the commission against alleged invasion of territory by a regulated utility. The same commission authority relied upon to enable it to entertain the complaint of an unregulated private carrier would seem to permit entertainment of the complaint of an unregulated electric cooperative.

DISCHARGE IN BANKRUPTCY

Hector Currie*

The question whether a particular claim has been discharged in bankruptcy is generally one for the state courts. Adjudication of an individual bankrupt is treated as an application for a discharge, and the discharge will be granted unless the bankruptcy court is satisfied that the bankrupt has obtained a previous discharge within six years or has been guilty of conduct condemned by Section 14c of the Bankruptcy Act. Section 17 provides that certain types of debt are not affected by a dis-

106. Id. at 17.
107. Ibid.
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2. 11 U.S.C. § 32c (1958). The six-year provision, § 14c(4), is the only ground for denial of a discharge not based on culpable conduct of the bankrupt. Obtaining money or property by means of a materially false statement in writing respecting one's financial condition is a ground, § 14c(3), but since 1960 this has applied only to persons "engaged in business."