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PUBLIC LAW

ADMINISTRATIVE PROCEDURE

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FAIR HEARINGS

In *Fitzgerald v. Davis*,[1] the Fourth Circuit had occasion to consider the hearing rights of a river pilot after the revocation of his pilot's license. Actual revocation power is vested in the Governor under the statute but before he may exercise such power he must refer the matter to a board of commissioners "which shall sit as investigators and report their findings to the governor, recommending, if justified, a penalty."[2] The pilot was duly notified by letter that the commissioners proposed to conduct an investigation and hearing, and two specific accidents were alluded to as putting the pilot's competency in issue. The letter also stated that "the hearing will include . . . previous accidents insofar as they might touch upon your competency as a pilot."[3] At the hearing, five specific accidents in which the pilot was involved were discussed and the pilot was also informed that he had been barred from one shipowner's ships. Written interrogatories were propounded for one accident, and the hearing was recessed to permit preparation of pilot's answers on the matter. Two additional meetings were held at which pilot was present with his counsel and at the last meeting the pilot was informed that a report would be made to the Governor. The possibility that the Governor might order the calling of a formal hearing "if he felt one was warranted" was alluded to. The proposed report was actually made a recommendation that the pilot's license be revoked in view of an additional accident in which he was later involved. The commissioners found that the pilot was "completely incompetent" on the basis of the five accidents on which evidence had been considered and which were found to have been caused by the pilot's lack of skill and poor judgment.

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1. 160 So. 2d 345 (La. App. 4th Cir. 1964).
2. LA. R.S. 34:1049 (1950).
3. 160 So. 2d at 347.

Against this background, the pilot complained that, since no "formal hearing" was held, he was deprived of due process of law. The court held that no *formal* hearing was required by the statute and that the commissioners had fully satisfied the statutory requirements. It rejected the constitutional argument on the ground that the pilot's license was a privilege and not a property right or interest, hence outside the protection of the due process clause.[4] Inasmuch as the pilot was accompanied by counsel and presumably had full opportunity to develop his defense, it might have been plausibly held that the hearing accorded him satisfied due process requirements. Since, however, he may not have had full opportunity to test all evidence against him by the judicial safeguards of cross-examination of sworn witnesses, a "formal" or judicial hearing might arguably have changed the result. Where, as here, credibility was evidently not a factor, could not a "fair" hearing be said to have been accorded within the due process clause? To have said so would have eliminated the need to characterize the interest involved as a "privilege" revocable, if the legislature chose, at the mere inclination of the Governor.[5]

When the St. Tammany Parish Police Jury were authorized to create a charity hospital, the local act of the legislature contained the relatively unusual provision that the board of commissioners to be designated by the police jurors should appoint a medical staff but that "such appointments shall be made upon the recommendation of the physicians who are authorized to practice within the hospital."[6] This provision has now been interpreted, in *Giles v. Breaux*,[7] to place upon the board the mandatory obligation to *appoint* any physician recommended for appointment by the medical staff but is held not to affect "the inherent authority of the Board to *suspend* or *revoke* staff privileges of any physician . . . whose professional qualifications are such as to render him not competent."[8] (Emphasis added.)

4. *Id.* at 349-50.

5. During the term, the Fourth Circuit had before it another river pilot case involving the issue of fair hearing. However, this involved suspension of membership in the river pilots' association rather than revocation of the state license to work as a pilot; since this was membership in a private association, the court refused to interfere absent a showing of conduct not in accord with the charter and by-laws. Heuer v. Crescent River Port Pilots' Ass'n, 158 So. 2d 221 (La. App. 4th Cir. 1963).

6. La. Acts 1950, No. 129, § 8.

7. 160 So. 2d 608 (La. App. 1st Cir. 1964).

8. *Id.* at 615.

The board had made no provision for revocation or suspension of the hospital privileges of a member of the medical staff although the staff itself had adopted by-laws containing such a provision. The board had vested operation of the two hospitals created under the statute in operating committees drawn from members of the board, but these operating committees had likewise made no provision for revocation or suspension of hospital staff privileges.

In this state of affairs, the plaintiff physician in this case applied for the required annual renewal of staff privileges to the medical staff and, in accordance with its by-laws, the staff met and approved the application subject to certain limitations on surgical practice.[9] Thereafter, the operating committee met and without affording the plaintiff any notice of charges of professional incompetency, or opportunity to answer them in hearing, voted to deny him staff privileges and so notified him by letter. Plaintiff brought an action in mandamus commanding admission to staff privileges and obtained a temporary restraining order preserving his staff status pending hearing. Subsequent to filing of this suit, the full board met and again denied the renewal of plaintiff's staff privileges, still without affording him an opportunity to be heard.[10]

The First Circuit held that the board was without power to delegate to an operating committee its entire implied power to revoke or suspend staff privileges as bestowed on it by the legislature.[11] It further held that the board was without power, under this unique Louisiana statute, to reject the recommendations of its medical staff on appointments and hence on the granting of staff privileges.[12] Finally, it held that the board and its operating committee acted arbitrarily and capriciously in suspending the physician's staff privileges as they did, without affording notice of charges and opportunity to meet them.[13] The court noted that the action was also discriminatory inasmuch as the actual alleged misconduct, consisting of the keeping of inadequate hospital patient records, was apparently not confined to this plaintiff. The First Circuit thoughtfully notes that, if the board had lived up to its responsibilities, the whole

9. *Id.* at 613.
10. *Ibid.*
11. *Id.* at 614.
12. *Id.* at 615.
13. *Id.* at 618.

matter "would probably have been settled within the walls of the hospital rather than the walls of the court room."[14] Certainly, the treatment of this plaintiff was something less than the "due process of law" which members of the profession have the right to expect from each other when they constitute themselves into an administrative agency as well as when they go to court.

The First Circuit had occasion to remind the Division of Employment Security, in *Jones v. Administrator*,[15] that a fair hearing is not accorded an applicant where the notice of contest charges one offense and the agency makes its determination of disqualification on another offense not charged. Here, insubordination had been charged but not proved, and, on administrative appeal, the disqualification was affirmed by the Board of Review on the different ground that applicant had left his employment without good cause.[16] As to this finding, applicant complained that he had been denied a fair hearing.[17] In ordering payment of benefits to applicant, the First Circuit noted that " 'the findings of fact . . . must be supported by evidence and by that is meant legal and competent evidence. To that statement of essential requirements must be added the basic prerequisite to any finding, that of notice of the charge and an opportunity to be heard thereon; otherwise, the parties are denied a reasonable opportunity for a fair hearing as conferred by statute.' "[18]

DELEGATION

In *Louisiana State Board of Embalmers v. Britton*,[19] the Supreme Court held that in the governing statute[20] the legislature had delegated to the board arbitrary power to grant or withhold a license to prospective embalmers and that the statute was hence unconstitutional in that it did not recognize the separation of governmental powers.[21] Specifically, the statute vests power in the board to issue a license if it finds "that the applicant possesses adequate knowledge of the science of embalming, sanitation, and disinfection and meets the qualifications prescribed."[22]

14. *Id.* at 617.
15. 154 So. 2d 54 (La. App. 1st Cir. 1963).
16. *Id.* at 54-55.
17. *Id.* at 55.
18. *Ibid.*
19. 244 La. 756, 154 So. 2d 389 (1963).
20. LA. R.S. 37:840, 842 (Supp. 1963).
21. 244 La. at 763-64, 154 So. 2d at 391-92.
22. LA. R.S. 37:842B (Supp. 1958).

This, said the court, could "only mean such knowledge as is deemed adequate by the Board"[23] and "provides no real standards or guides."[24] It will be interesting to see what is submitted by way of amendment to cure the constitutional defect now laid bare.

One Justice dissented and referred to a dissent in a prior similar case in which he had been unable to find unconstitutionality in the powers delegated to the State Board of Examiners in watchmaking. He there noted " ' "the modern tendency is to be more liberal in permitting grants of discretion to administrative bodies . . . in order to facilitate the administration of laws." ' "[25] Davis, in his work on Administrative Law, notes that the Maryland court quoted by the dissent went on to state that " 'where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without restrictions may be valid.' "[26] Assuming our regulation of embalmers is a necessary health and safety measure and not one designed surreptitiously to countenance restraints of trade, it may be that we must rely on a large measure of discretion vested in the board to accomplish these objectives. Protection against favoritism or other unfairness may have to be accomplished in other ways.[27]

PLEADINGS, FINDINGS AND ORDERS

Johns v. Jefferson Davis School Board[28] provided an opportunity for the Third Circuit to review action taken by the school board and to find that it failed to measure up to standards of fair administrative procedure. The occasion was presented by the dismissal of a tenured school teacher of almost thirty years experience, seventeen of them as an elementary school principal,

23. 244 La. at 763, 154 So. 2d at 391.
24. *Id.* at 765, 154 So. 2d at 392.
25. Dissent, State v. Morrow, 231 La. 572, 582, 92 So. 2d 70, 74 (1956).
26. Pressman v. Barnes, 209 Md. 544, 555, 121 A.2d 816, 822 (1956); commented on in 1 DAVIS, ADMINISTRATIVE LAW TREATISE 2.15, at 150-51 (1958).
27. 1 DAVIS, ADMINISTRATIVE LAW TREATISE 2.15, at 151 (1958): "The elements of protection that may often be feasible include a hearing with a determination on the record, a requirement of findings and reasons, respect for consistency of principle from one case to another, and opportunity for check or supervision either by administrative review or legislative review or judicial review."
28. 154 So. 2d 581 (La. App. 3d Cir. 1963).

for his inability to cope with a situation precipitated when his school was expanded to high school status. The situation was highly charged primarily because a student pregnancy was attributed to inadequate supervision and discipline during school hours. In this setting, Johns was charged with wilful neglect of duty and incompetence on a number of counts and dismissed.[29]

The court thoroughly reviewed the record, finding most of the charges explained away or unsustained by evidence except for a proved inability to handle a high school situation.[30] It also found that evidence was taken by the board of alleged delinquencies beyond those charged at the outset which the teacher had no opportunity to prepare against.[31] As the court points out, "if the board had rejected the unproven charges and those based on improperly admitted evidence . . . [it is] uncertain what, if any, disciplinary action the board might have taken. It might . . . simply have reprimanded the plaintiff; or, if it had removed him, the 'removal' might have consisted of a demotion or a transfer to some less favorable assignment, instead of an outright dismissal from the school system."[32] The case was remanded for further proceedings not inconsistent with the views expressed. Such additional proceedings would, presumably, insure adequate notice of the charges on which evidence is to be heard, findings based on such evidence, and an order properly attuned not only to what had been charged but to what had been charged *and proved.*

FINDINGS

For the past several years, a federal employee has been eligible for state unemployment compensation benefits if an appropriate federal-state agreement is in effect.[33] However, under the statute, there may be no redetermination in a state forum of the validity of the findings made by a federal agency for termination of federal service.[34] Thus, in *Thompson v. Brown*,[35] plaintiff made application for benefits under Louisiana law, but his claim was rejected because the circumstances surrounding his separation from federal service constituted misconduct. On ap-

29. *Id.* at 583.
30. *Id.* at 587.
31. *Ibid.*
32. *Id.* at 588.
33. 42 U.S.C.A. §§ 1361, 1364 (1964).
34. *Id.* § 1367.
35. 157 So. 2d 239 (La. App. 3d Cir. 1963).

peal, plaintiff sought review of the determination and thus precipitated for the court the question of the scope of its review under the federal statute. It interpreted the federal statute as pretermitting *all* inquiry into the conduct which gave rise to termination of the federal service but as leaving open the issue of whether the conduct for which he was dismissed constituted misconduct under the Louisiana law.[36] Since the conduct in question consisted of falsifications on an application for a position of trust in the federal service, the court found no error in equating it with misconduct under the Louisiana statute, such conduct having been held to include " 'a deliberate violation of the employer's rules, and a disregard of standards of behavior which the employer has a right to expect of his employees.' "[37]

FINALITY OF ORDERS

In *Chubb v. DeKeyzer*,[38] the Supreme Court reviewed administrative action taken under the Agricultural Adjustment Act by a county committee and a statutory review committee, such review, under the statute, being limited to questions of law. Findings of fact by the agency, if supported by evidence, are made conclusive.[39] A rice grower, contemplating the sale of a part of his farm, asked for an apportionment of his acreage allotment under a regulation which provided for apportioning such allotment "on the basis of the cropland normally considered as available for and adapted to the production of the allotment crops on each tract."[40] "Normally available" was initially interpreted so as to exclude cropland converted or *intended* to be converted to other crops.[41] On the basis of this interpretation, the entire allotment of the original farm was apportioned to the tract sold and some steps were taken to convert the tract retained to other uses.[42] However, two years later the tract retained was sold and the purchaser petitioned the county committee to reopen their apportionment and allocate the allotment for rice growing on the basis of the cropland actually adapted to rice growing at the time of the first sale. The county committee, in an ex parte proceeding, did reopen its apportionment

36. *Id.* at 241.
37. *Ibid.*
38. 245 La. 735, 161 So. 2d 63 (1964).
39. 52 Stat. 63 (1938), 7 U.S.C.A. § 1366 (1964).
40. 7 C.F.R. § 719.8(a)(2) (Supp. 1962).
41. 245 La. at 741, 742, 161 So. 2d at 64, 65; see also Chubb v. DeKeyzer 152 So. 2d 77, 81 (La. App. 3d Cir. 1963).
42. 245 La. at 743, 161 So. 2d at 65-67.

order and reallocate the allotment, and its revised apportionment was affirmed by the statutory review committee.[43] This reopening of the Committee's initial ruling was under a regulation providing that a farm must be reconstituted by the recombination of the different tracts into which it was divided "*whenever* the farm was not properly constituted under the applicable regulations in effect at the time of the last constitution."[44] There was no time limitation placed on the county committee's reopening of its determination; the only limitation lay in the requirement that the initial apportionment must have been made of a farm "not properly constituted" under the regulatives then effective for cropland allotments.[45]

The Third Circuit Court of Appeals proceeded on the assumption that the initial ruling "may . . . be considered to have been in error" but was unwilling to consider it as a "completely void ruling."[46] However, since it was an administrative ruling, the court hesitated to apply *res judicata* principles (even though esteeming their appropriateness) in the face of a clear provision for reopening the apportionment;[47] indeed, since this was still a direct attack on the order for mistake of law or fact, there being no provision for its becoming final by failure to appeal, it might also not even be susceptible to the application of *res judicata* principles.[48]

The Third Circuit seemed to reject also the possible application of conventional estoppel principles, although there seemed substantial basis for their application since the first purchaser had bought the tract on the basis of the potential favorable acreage for rice resulting from the first apportionment.[49] This court preferred to put its holding upon "the presumption of regularity [which] supports the official acts of public officers" and that, consequently, "the county committee did not as a matter of law have the right . . . to ignore and to rescind ex parte the presumably-valid formal committee action [of earlier date]."[50] However, this court chose, "in summary," to array other considerations as well in support of its holding, not least

43. *Ibid.*
44. 7 C.F.R. § 719.2(4)(1)(ii) 1964).
45. 245 La. at 744, 161 So. 2d at 66.
46. 152 So. 2d at 83.
47. *Id.* at 84.
48. 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 18.09, at 606 (1958).
49. 152 So. 2d at 84.
50. *Ibid.*

of which being the fact that "private parties have substantially changed their position in reliance upon the original administrative ruling . . . as a result of which valuable property interests are based upon the validity of such specific ruling."[51]

The Supreme Court affirmed the Third Circuit but chose to explore the issue of whether the farm was "properly constituted" for the original apportionment.[52] To do so, it was willing to explore the *fact* issue of whether the tract retained was "available for rice planting" since the old owner "had surrendered all allotments insofar as his acreage was concerned and had declared his intention to devote all that acreage exclusively to cattle raising."[53] This would, however, seem somewhat question-begging since this was the allegedly erroneous interpretation of "normally available" on which the second purchaser rested his petition for reopening the original apportionment.[54] Perhaps, however, this is no more than the court saying that the original interpretation of "cropland normally . . . available" was correct in excluding acreage *intended* to be converted to other uses, a holding which the Third Circuit was unwilling to make but which was nonetheless clearly available to the court as a "question of law" under the review provisions of the Agricultural Adjustment Act.[55]

The case underscores the desirability of being able to invoke estoppel principles against a government agency;[56] perhaps it is time for the United States Supreme Court to revise the principle as expressed by it that "whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."[57]

PRIMARY JURISDICTION

Peete v. Scheib[58] underscores the difficulties encountered when a civil service employee is suspended from his employ-

51. *Ibid.*
52. 245, La. at 744, 161 So. 2d at 66.
53. *Id.* at 746, 161 So. 2d at 66-67.
54. 152 So. 2d at 81.
55. 52 Stat. 63 (1938), 7 U.S.C.A. § 1366 (1964).
56. See 2 DAVIS, ADMINISTRATIVE LAW § 17.09 (1958).
57. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947).
58. 156 So. 2d 280 (La. App. 4th Cir. 1963).

ment while criminal charges are pending against him and months or even years elapse before such charges are finally disposed of. In this case, employee failed to appeal his suspension to the Civil Service Commission, citing as his reason "the fact that criminal charges were still pending aginst him."[59] Some fifteen months later, employee accepted reinstatement after he had been acquitted of the most serious charge, but at a time when other charges were still outstanding. He then waited to make his demand for wages lost until after the latter charges had been nolle prosequied. The wage demand was rejected by the agency and the rejection upheld by the Civil Service Commission on the ground that it was in effect a request for a money judgment since made independently of an appeal from a suspension or discharge.[60]

In a mandamus proceeding, the Fourth Circuit upheld the Civil Service Commission and reversed the trial court's action in ordering the employing agency to pay. To uphold the trial judge, reasoned the court, would be to usurp a function vested in the Civil Service Commission, namely, " 'the exclusive right to hear and decide all appeals and the legality of all removal and disciplinary cases.' "[61] The court noted that, in these circumstances, "a ruling from the Civil Service Commission, involving the legality or illegality of disciplinary action is a necessary prerequisite to a mandamus proceeding and this conclusion is fully supported by the rationale of the jurisprudence."[62]

How then might the employee have proceeded in order to save his right to litigate the issue of back pay? It would seem to have required that he take a timely appeal from his reinstatement without back pay since failure to restore wages lost as of that time would have been in the nature of a sanction and its legality could properly be passed upon by the Civil Service Commission.[63] This may not have been done because criminal charges were still outstanding at this time. However, it would seem that the commission proceedings could have been continued pending the disposition of such charges; upon disposition, a definitive order on the reinstatement with or without back wages could be issued. If adverse to the applicant, a mandamus

59. *Id.* at 282.
60. *Id.* at 281.
61. *Id.* at 282.
62. *Id.* at 284.
63. LA CONST. art. XIV, § 15.1, paragraph 31.

proceeding would presumably then lie without violating the exclusive primary jurisdiction of the Commission.[64]

DISCHARGES IN BANKRUPTCY

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During last term, in *Louisiana Machinery Co. v. Passman*,[1] the Third Circuit took the opportunity to reaffirm the jurisprudence on the effect of a discharge in bankruptcy on a duly scheduled claim on which suit had been brought and default judgment taken after discharge. The litigation arose some ten years after adjudication, in a suit to revive a judgment.[2] The court quoted approvingly that "the effect of the discharge on a judgment against the bankrupt based on a provable claim is the same as its effect on the claim itself . . . the discharge will bar personal enforcement of the judgment against the bankrupt, or against any property of the bankrupt on which it was not a lien . . . the reduction of such liability to a judgment does not change its nature or character."[3]

Here, since the original judgment could not be enforced against the bankrupt, it followed that such a judgment, revived, could not be enforced either.[4] The fact that bankrupt permitted the suit to go to judgment against him did not defeat his right to interpose his discharge whenever the judgment was sought to be enforced, whether immediately or ten years thereafter, as in the instant suit.[5]

In *Robinson v. Henderson*,[6] a bankrupt persuaded an associate to sign a note with him as an accommodation maker. After several payments on the note by the bankrupt, he filed a voluntary petition in bankruptcy but did not schedule the note as a debt for which he was seeking discharge. In due course, a discharge was granted to bankrupt, his assets were sold, the pro-

64. See *The Work of the Louisiana Supreme Court for the 1957-1958 Term — Administrative Law*, 19 LA. L. REV. 351, 352-53 (1959).

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1. 158 So. 2d 419 (La. App. 3d Cir. 1963).
2. Pursuant to LA. CODE OF CIVIL PROCEDURE art. 2031 (1960).
3. 8B C.J.S. *Bankruptcy* § 563 (1963).
4. 158 So. 2d at 422.
5. *Id.* at 421.
6. 162 So. 2d 116 (La. App. 3d Cir. 1964).