Louisiana Law Review

Volume 31 | Number 2
The Work of the Louisiana Appellate Courts for the 1969-1970 Term: A Symposium
February 1971

Public Law: Administrative Regulation - Law and Procedure

Melvin G. Dakin

PUBLIC LAW

ADMINISTRATIVE REGULATION: LAW AND PROCEDURE

*Melvin G. Dakin**

Civil Service Commissions

The civil service article of the Louisiana Constitution includes a provision authorizing a civil service commission to "reinstate employees under such conditions as it deems proper and may order full pay for lost time."[1] Under this conditioning power, the commission practice developed of deducting from back pay wages earned in private employment by an employee during the time he was separated from the service, if the commission found that he had been illegally separated and had ordered reinstatement with back pay.[2] However, this discretionary power was deemed to extend only to cases in which the commission itself reinstated the employee.[3] If the reinstatement was the result of a judicial appeal a court was deemed powerless to deduct wages earned by plaintiff during illegal separation from service presumably on the theory that the court did not share the commission's power to impose conditions incident to an order of reinstatement.[4] A decade ago the legislature took steps to remedy this situation by providing: "Employees in the state or city civil service, who have been illegally discharged from their employment, *as found by the appellate courts*, shall be entitled to be paid by the employing agency all salaries and wages withheld during the period of illegal separation, against which amount shall be credited and set-off all wages and salaries earned by the employee in private employment in the period of separation." (Emphasis added.)[5] In a previous term our supreme court had considered and applied this provision in a case in which the commission had found the employee's removal justified, but a court of appeal had reversed and ordered the employee reinstated. The supreme court ordered the judgment amended so as to give effect to the setoff provided

* Professor of Law, Louisiana State University.

1. LA. CONST. art. XIV, § 5(O)(3).

2. *See The Work of the Louisiana Supreme Court for the 1958-1959 Term —Administrative Law*, 20 LA. L. REV. 268-71 (1960).

3. Hermann v. New Orleans Police Dep't, 238 La. 81, 113 So.2d 612 (1959).

4. *Id.*

5. LA. R.S. 49:113 (1960).

by the legislature.[6] In *LeBlanc v. New Orleans Police Department*[7] the Fourth Circuit Court of Appeal applied the provision where the commission found the separation illegal and affirmed the commission's action. It was argued that since a court had not "found" the separation illegal the commission's deduction was improper. The Fourth Circuit, however, took the plausible view that the commission could make the deduction under its constitutional conditioning power and that the later legislative provision addressed to the courts empowered the courts to affirm a deduction by the commission even though such illegal separation had not been "found by the appellate courts."[8]

The state Civil Service Commission, under its general rulemaking powers with respect to classification plans, has proscribed certain activities, including the making of false statements with regard to any application for rating.[9] It has also provided that it shall be the duty of every classified employee to assist the commission and the department in the effective carrying out of constitutional provisions and rules and to answer truthfully, whether under oath or otherwise, all proper questions put by authorized representatives of the department or the commission.[10] In *In re Taylor*[11] the First Circuit Court of Appeal addressed the issue of whether a civil service employee violated the foregoing rules in failing to report a fraudulent rating prepared by a superior and of which the employee had knowledge as the result of preparing papers incident thereto. The First Circuit held that there was no duty under this rule to volunteer information to the commission concerning the fraud of a superior.[12] While such a duty, were it within the power of the commission to create, would greatly reduce the possibility of fraud, the present holding leaves the revelations of fraud to commission audits and to anonymous informers. The First Circuit said: "We doubt that it was intended that every employee in the Civil Service be an informer under penalty of dismissal or discipline or that they

6. Higgins v. Louisiana State Penitentiary, 245 La. 1009, 162 So.2d 343 (1964).

7. 231 So.2d 568 (La. App. 4th Cir. 1970), disposing also of Thome v. New Orleans Police Dep't, 231 So.2d 572 (La. App. 4th Cir. 1970) and Parta v. New Orleans Police Dep't, 231 So.2d 575 (La. App. 4th Cir. 1970).

8. LeBlanc v. New Orleans Police Dep't, 231 So.2d 568, 570-71 (La. App. 4th Cir. 1970).

9. CIV. SERV. R. 14.1.1(c).

10. *Id.* 14.1.1(f).

11. 233 So.2d 49 (La. App. 1st Cir. 1970).

12. *Id.* at 53-54.

be required to determine the legality or propriety of various actions which might be taken by their superiors."[13]

In *Maggio v. Department of Public Safety*[14] the commission had determined that the probationary period of "six months following appointment" commences when the employee's first pay period begins.[15] The First Circuit, however, noting that a probationary period was a work test period, concluded that there could be no work test until the employee commences work. Hence they plausibly held that the starting point of the probationary period must be the day on which the employee started performance of the duties for which he was engaged.[16]

Under the civil service rules of the New Orleans Police Department, "[i]f an employee of the police department is injured directly in the performance of his duty for the protection of life and property, the employee shall be granted additional sick leave with pay, which shall not be charged against his ordinary sick leave accumulation. . . . "[17] In *Blanchard v. New Orleans Police Department*[18] a patrolman contracted typhoid fever and requested that he be accorded benefits under this provision on the ground that the fever could only have been contracted during an investigation conducted aboard a Chinese vessel in the Port of New Orleans. Since no evidence could definitely determine where the patrolman contracted the virus, the commission refused to make a finding of fact under this provision. However, the commission also based its decision on the "hot pursuit" interpretation of this provision, limiting such "pursuit" to the performance of duties involving exposure of the policemen to extraordinary danger in the protection of life and property. The provision as thus construed would not embrace any and every injury or illness arising out of or in the scope of employment as used in conjunction with workmen's compensation provisions, but only those incurred in such "pursuits."[19] On appeal, the Fourth Circuit concluded that this construction was too narrow and that the provision was intended to be applicable to a patrolman "whenever he is carrying out the official orders or require-

13. *Id.* at 53.
14. 234 So.2d 844 (La. App. 1st Cir. 1970).
15. *Id.* at 846.
16. *Id.*
17. NEW ORLEANS CIV. SERV. R. VIII, § 2.1(c).
18. 233 So.2d 716 (La. App. 4th Cir. 1970).
19. *Id.* at 717.

ments of his office."[20] The court also concluded that, while it might not be possible to infer from the evidence that the disease had been contracted on the Chinese vessel, lack of such a finding could not be construed as a finding of fact that the patrolman had not contracted the disease elsewhere in line of duty; hence he might still be covered by the provision. On this basis the court remanded the case to the commision for determination as to whether, by a preponderance of the probabilities shown by the record, the patrolman did or did not contract his illness while on duty along the riverfront or on the Chinese vessel.[21]

In the 1968-1969 term the First Circuit reviewed the *ad hoc* rulemaking procedures of the Louisiana State Penitenitary in *Guillory v. State, Department of Institutions*[22] and remanded a case to the commission for the purpose of permitting a discharged employee to prove a broader *ad hoc* rule was in effect at the penitentiary, which conceivably would have mitigated his penalty for an offense from outright discharge to transfer to other institutional employment. Upon reconsideration this term, the First Circuit has abandoned its earlier concern and concluded that on such a rulemaking matter it should not inject itself into the "disciplinary measures imposed by the appointing authority."[23] A more satisfactory disposition of the matter might have been a holding that the request for application of the mitigating rule urged, contemplating a transfer of an incapacitated employee to some other form of duty, was untimely if raised only as a defense to the serious dereliction of sleeping on duty at a penitentiary. The right to request a transfer which could have been exercised prior to the infraction, but was not, might be deemed waived; such an analysis would have disposed of the due process issue raised in the first decision.

The Louisiana Constitution empowers the Civil Service Commission to make changes in classification plans but provides that when changes are proposed there shall be reasonable opportunity to be heard afforded to affected employees.[24] *Meaux v. Department of Highways*[25] involved a proposal of the Depart-

20. *Id.*
21. *Id.* at 717-18.
22. 219 So.2d 282 (La. App. 1st Cir. 1969), commented on at *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Administrative Procedure*, 30 LA. L. REV. 263-65 (1970).
23. Guillory v. State, Dep't of Institutions, 234 So.2d 442, 444 (La. App. 1st Cir. 1970).
24. LA. CONST. art. XIV, § 15(I).
25. 228 So.2d 680 (La. App. 1st Cir. 1969).

ment of Highways for work rules for bridge tenders based on the number of bridge openings per month. The proposal was prompted by civil service employees' protests that they were being subjected to illegal work weeks. Pursuant to its powers the commission received and approved the proposed work rules. Despite such approval, the Department of Highways did not put the rules into effect but instead fixed the hours on the basis of the number of bridge tenders assigned to each bridge, maintaining in a letter to the commission that this had been its intention in its original request. It therefore requested the commission to amend its approval accordingly. The commission approved the rules by letter but afforded no opportunity to employees to be heard on the matter.[26] The Department of Highways was censured by the First Circuit and ordered to make appropriate pay adjustments to comply with the original order since the procedure followed was deemed in violation of employees' hearing rights.[27]

The commission, pursuant to its constitutional rulemaking power, has prescribed that in proceedings before it, "[t]he burden of proof as to the facts shall be on the appellant in every appeal and he shall be required to open the case."[28] However, in *Foster v. Department of Public Welfare*,[29] an appeal to the First Circuit some years ago where an employee testified denying charges on which dismissal was based and counsel for the agency relied solely upon the charges as constituting *prima facie* proof of their validity, the court remanded the case for further proceedings holding that where the discharged employee denied the charges, and no evidence of alleged misconduct was introduced, the discharge was illegal as a matter of law.[29] The court also made dicta statements that "although the burden as to the facts is on appellant, such burden does not exist until such time as the Commission places in the record some evidence to support its findings of fact," and that "no duty evolved upon appellant to prove the falsity of the charges . . . until such time as there is in the record at least some evidence of substantiation of the charges."[30] *In Trotti v. Department of Public Safety*[31] the First Circuit repudiated these dicta statements on the ground that they

26. *Id.* at 684-85.
27. *Id.* at 689.
28. LA. CIV. SERV. R. 13.19(c).
29. 144 So.2d 271 (La. App. 1st Cir. 1962).
30. *Id.* at 275.
31. 234 So.2d 450 (La. App. 1st Cir. 1970).

were misleading and did violence to the express constitutional provision relative to the burden of proof. The net result of the *Trotti* holding is to permit the commission to maintain its present procedure pursuant to which an employee opens his case and offers his testimony in denial of the charges. If the agency then puts on evidence sustaining the charges, the employee is restricted to rebuttal of matters brought out by the appointing agency during its presentation of evidence. However, the court, concerned that counsel for the employee in the instant case had in good faith relied upon the misleading *dicta* in *Foster* and had fatally limited his employee client in initial testimony, remanded the matter for the purpose of receiving and considering his rebuttal testimony.[32]

Our supreme court stated in *King v. Department of Public Safety* that in a dismissal case "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 . . . disciplinary action, provided it felt the assigned cause was not of such a serious nature as to endanger the efficiency of the service."[33] In *Cormier v. Department of Institutions*[34] the commission refused to hear testimony that a dismissal was based on political or otherwise impure motives, stating that it was interested only in evidence relating to charges in the letter of dismissal. The First Circuit remanded for admission of such evidence, citing the *King* decision and noting that failure to admit such evidence constituted reversible error. On remand the commission heard the evidence and ordered reinstatement of the employee, and, on appeal, the First Circuit affirmed on the merits.[35]

Department of Employment Security

The several circuits were as usual presented with an array of mixed questions of law and fact from the Department of Employment Security. In disposing of one of them in *Rankin v. Doyal*,[36] the Second Circuit noted again that its judicial review was

32. *Id.* at 454-55.
33. 234 La. 409, 418, 100 So.2d 217, 220 (1958), commented upon in *The Work of the Louisiana Supreme Court for the 1957-1958 Term—Administrative Law*, 19 LA. L. REV. 351, 354 (1959).
34. 212 So.2d 143 (La. App. 1st Cir. 1968).
35. Cormier v. Board of Institutions, 230 So.2d 307 (La. App. 1st Cir. 1969).
36. 223 So.2d 214, 217 (La. App. 2d Cir. 1969).

statutorily limited to a determination of whether the facts found by the board were supported by competent evidence and if so, whether such facts as a matter of law justified the action taken. In other cases the courts found no new questions of law presented and affirmed the department in all instances.[37]

A foray into the legislative history of the Unemployment Security Act in *Doyal v. Roosevelt Hotel*[38] persuaded the Fourth Circuit that it was not the intention of the legislature to include tips or gratuities in remuneration for the purpose of determining contributions by the employer and benefits to be received by the employee. While tips and gratuities were specifically included in the original 1936 Act within the definition of wages, they were excluded in a 1948 amendment.[39] Thus while "remuneration" as used in the Act *could* be interpreted to include such tips and gratuities, it was the opinion of the court that it was the legislative intent that they not be considered.[40]

Structural Pest Control Commission

The courts of Louisiana have occasionally declared unconstitutional occupational and professional licensing statutes on the ground that they delegated power without reasonably clear standards or guides. Typical of such statutes was one creating a Board of Watchmakers and delegating the power to that body to license as watchmakers those who "possess such general education, training and experience as the board may determine." It was held invalid since there were neither guides for an examination of applicants nor any indication of the quality of performance required from such applicants.[41] A similar attack was made this term in *Pearce ex rel. Structural Pest Control Commission v. Sharbino*[42] on a statute authorizing a Structural Pest Control Commission to administer examinations and license applicants. The legislature provided that "[a]ll applicants for examination for licenses must have a knowledge of the practical and scientific facts underlying the practice of structural pest control. . . ."[43] The provision was attacked by an operator who had

37. *Id.* Ball v. Administrator of the Div. of Employment Sec. of the Dep't of Labor, 231 So.2d 470 (La. App. 2d Cir. 1970); Jackson v. Doyal, 231 So.2d 462 (La. App. 3d Cir. 1970), *rehearing denied*, Feb. 4, 1970.
38. 234 So.2d 510 (La. App. 4th Cir. 1970).
39. *Id.* at 512-13.
40. *Id.* at 514-15.
41. State v. Morrow, 231 La. 572, 92 So.2d 70 (1956).
42. 254 La. 143, 223 So.2d 126 (1969).
43. LA. R.S. 40:1265A (1950).

been practicing pest control without a license and against whom the commission sought an injunction. The supreme court sustained the statute against the attack by interpreting the requirement that applicants have certain designated knowledge as, in effect, the creation of guides for an examination adequate to remove such examination from the unfettered discretion of the commission.[44] While the court conceded that the provision might be construed as not directed to the commission, since somewhat inartistically drawn, it nonetheless found it possible to uphold the statute as an adequately limited delegation of authority.[45]

State Board of Medical Examiners

The Fourth Circuit had occasion during the 1969-1970 term to approve an ingenious procedure for achieving enforcement of license revocation by the State Board of Medical Examiners. In *Louisiana State Board of Medical Examiners v. Heiman*,[46] although consent judgment and injunction against engaging in the practice of medicine had been obtained against a doctor, he nonetheless continued to do so. On a rule to show cause, the doctor was warned of the consequences of not obeying the injunction; on a second rule the doctor was held in contempt and sentenced to one year in parish prison with 355 days of the sentence suspended upon condition that he not engage in the practice of medicine without having a valid certificate.[47] The doctor attacked the sentence on the ground that it went beyond the punishment authorized for such violations; the statute only provides, in addition to an injunction, that the board may request a penalty of $100.00 and attorneys fees of $50.00, with nothing provided as to imprisonment.[48] The court noted, however, that the trial judge was not proceeding under the special statute but under the general authority which the court has to punish for contempt. Consequently it was limited only by the contempt statute which authorizes it to impose fines of not more than $1,000.00 or imprisonment for not more than twelve months or both.[49] Since here the contempt punishment was primarily to gain future acquiescence in the injunction against the practice of medicine,

44. Pearce *ex rel.* Structural Pest Control Comm'n v. Sharbino, 254 La. 143, 152, 223 So.2d 126, 129 (1969).
45. *Id.*
46. 230 So.2d 405 (La. App. 4th Cir. 1970).
47. *Id.* at 406.
48. LA. R.S. 37:1286 (1950).
49. LA. CODE CIV. P. art. 224(2); LA. R.S. 13:4611 (1950).

it would not seem improper to impose a suspended sentence conditioned upon adherence to the injunction. A showing of violation of the condition would immediately precipitate revocation of some or all of the suspension until adherence was in fact achieved.

Louisiana Tax Commission

Our scheme of property taxation contemplates that assessors will make the initial assessment and that after the rolls have been exposed to the public, the police juries sitting as Boards of Reviewers in each parish will review the work of the assessors and make recommendations to the tax commission concerning appropriate increases or decreases in property valuation.[50] The tax commission thus is vested with final administrative authority to fix and equalize such valuations. In the parish of Orleans, the Board of Reviewers consists, not of a police jury, but of the mayor and members of the city government, the Board of Assessors, a member of the Board of Liquidation, a member of the Sewage and Water Board and the president of Orleans Parish School Board.[51]

In *City of New Orleans v. Comiskey*[52] the city, unhappy with the work of the assessors, sought a writ of mandamus to compel assessors in the parish to assess real estate uniformly and at its actual cash value. The Fourth Circuit ruled that the city was not entitled to a writ of mandamus since it had not yet exhausted the administrative remedies available to it; as "an interested party" within the statute, it should appear before the Board of Reviewers and petition that body for relief.[53] The court also held that it was within the power of the Board of Reviewers not only to make recommendations with respect to specific assessments but also recommendations to the tax commission with respect to general practices of assessment.[54] Presumably, only after the Board of Reviewers has failed to make requested recommendations to the tax commission or the tax commission has failed to act thereon would the city have exhausted its administrative remedies and be eligible for judicial relief.[55]

50. LA. R.S. 47:1995-96 (1950).
51. LA. R.S. 47:1931 (1950).
52. 232 So.2d 840 (La. App. 4th Cir. 1970), *rehearing denied*, April 6, 1970.
53. *Id.* at 842.
54. *Id.* at 843.
55. Since officials of the city are members of the Board of Reviewers, presumably a minority report could be filed in the event the Board of Reviewers refused to make requested recommendations to the tax commission.

In the event of unfavorable action by the tax commission the question arises as to what would be the position of the city, since it is not a taxpayer within the provisions permitting judicial review?[56] Also mandamus might be refused on the ground that it was an attempt to order discretionary action.[57] Would the city have a remedy within the provisions of the Administrative Procedure Act, since that Act provides that "[a] person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review"?[58] While the act speaks only of review of adjudication, this limitation should not be an obstacle since the proceedings before the Board of Reviewers and before the tax commission are in the nature of class adjudication. As the proponent of the position that actual cash values and uniform assessment had not in fact been the criteria applied, the city would have the burden of proof to show this by a preponderance of the evidence. In the absence of controverting evidence by the assessors, the recommended decision by the Board of Reviewers should be appropriate adjustment in the assessments. After administrative review and final decision by the tax commission, it would appear that the matter was ripe for judicial review under the provisions of the Administrative Procedure Act.[59]

The limitations of mandamus as a device for reviewing the action of the tax commission were underscored in *Karno v. Louisiana Tax Commission*.[60] A taxpayer there sought the writ to command the tax commission to approve tax rolls as submitted by the tax assessor of Jefferson Parish. The court refused to issue the writ since this would have eliminated the discretion with which the tax commission is charged in performing its duties to fix and equalize valuations and generally review the assessment rolls.[61] In this case informal intervention in parish assessments had begun early in the tax year when the tax commission, of its own motion, and on the basis of informally obtained information, wrote assessors notifying them that because of a number of complaints from individual taxpayers and one or more officials, and because of its own belief that the ratio

56. LA. R.S. 47:1998 (1950).
57. *See* note 60 *infra* and accompanying text.
58. LA. R.S. 49:964 (Supp. 1967).
59. *Id.*
60. 233 So.2d 592 (La. App. 4th Cir. 1970), *rehearing denied*, March 9, 1970.
61. *Id.* at 598.

between assessments and market value in the parish were generally lower than most other parishes in the state, it would not accept any 1969 assessments that were less than the 1968 assessments of such properties.[62] Disagreement then developed within the tax commission, the upshot of which was that the chairman of the tax commission, without the acquiescence of any other board members, directed that the tax rolls be exposed to the public.[63] Some months later, however, when the tax rolls were actually filed with the tax commission, the full commission refused to approve the assessments until the 1969 reduced assessments were restored to the 1968 level.[64] The instant mandamus proceeding followed. Instead of seeking to mandamus the tax commission into filing the rolls as submitted, had the taxpayer waited for the final action by the tax commission fixing the value of the taxable property in the parish of Jefferson, it would seem to have been in a position to request judicial review as "a person aggrieved by a final decision or order in an adjudication proceeding" under the Administrative Procedure Act.[65]

School Boards

In *Campo v. East Baton Rouge Parish School Board*,[66] a proceeding in the nature of mandamus in which a demoted school teacher sought to be reinstated and reimbursed for loss of pay, the transcript of the hearing before the school board was not introduced in evidence before the trial judge until after a preliminary default judgment against the school board had been taken and confirmation thereof was sought. The trial judge did not examine the transcript. The school board filed application for a new trial on the ground that the default judgment was rendered without review of the record before the school board; therefore, the dismissed school teacher had failed to establish a *prima facie* case to support the judgment as required by the Louisiana Code of Civil Proceudre. A new trial was not granted and the school board appealed. The First Circuit noted that the Tenure Act[67] granted a full judicial hearing to review the action of the school board and that this contemplated not a *trial* but a *review* of the action of the school board on its record, which here had not

62. *Id.* at 594.
63. *Id.* at 594-95.
64. *Id.* at 595.
65. LA. R.S. 49:964 (Supp. 1967).
66. 231 So.2d 67 (La. App. 1st Cir. 1970).
67. LA. R.S. 17:443 (1950).

been had. On this basis the court remanded the case to the trial court.[68] The case should be compared with *Lewing v. DeSoto Parish School Board*[69] where our supreme court not only ruled that the case must be submitted on the record as made before the school board but that no additional evidence could be introduced by the school board. The court noted that a full hearing at the district court level was provided for the protection of permanent school teachers and that such provision confined the school board to the record on which it had acted unless the discharged teacher chose to introduce additional evidence in her behalf; only in such an event would the school board have an opportunity to adduce additional evidence.[70] It is thus not entirely accurate to say, as the First Circuit did, that the district court acts only as an appellate court. Rather it acts as an appellate court insofar as the school board is concerned but as a trial court to the extent of permitting the discharged school teacher to introduce additional evidence in her behalf.[71] The procedure is reminiscent of that evolved by Congress in connection with the review of ICC reparation orders at the behest of the railroad; the hybrid procedure there was a response, in part, to the threat of unconstitutionality on the basis of depriving a person of a common-law jury trial.[72] No such threat would seem to warrant this hybrid procedure in school board cases. Except for newly discovered evidence, it would seem appropriate and more efficient to require the discharged teacher to adduce all of her evidence at the level of the school board proceeding, with judicial review confined to the record so made.

Miscellaneous Licensing and Zoning Matters

In *Gulf Federal Savings & Loan Association v. Sehrt*,[73] a proceeding attacking the licensing of five new savings and loan branches in Jefferson Parish, the First Circuit took the position that an error in pleading, combining summary and ordinary process, could properly be corrected without beginning over.

68. Campo v. East Baton Rouge Parish School Bd., 231 So.2d 67, 73 (La. App. 1st Cir. 1970).

69. 238 La. 43, 113 So.2d 462 (1959), commented upon in *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Administrative Law*, 20 LA. L. REV. 268, 275-76 (1960).

70. Lewing v. DeSoto Parish School Bd., 238 La. 43, 52, 113 So.2d 462, 465 (1959).

71. Campo v. East Baton Rouge Parish School Bd., 231 So.2d 67, 71 (La. App. 1st Cir. 1970).

72. Act of March 2, 1889, ch. 382, § 5, 25 Stat. 855, 861.

73. 233 So.2d 268 (La. App. 1st Cir. 1970), *rehearing denied*, April 13, 1970.

After the licenses had been granted, a competing institution and certain others instituted a suit in the nature of injunction requesting that a rule be issued to the Banking Commissioner directing him to show cause "why he should not forthwith suspend the operation of the approvals and permits issued" on the basis of illegality in their issuance.[74] The trial court was persuaded that the plaintiffs were asking for mandatory relief requiring the use of ordinary process rather than the summary process authorized in respect to show cause orders.[75] The First Circuit took the view that since the plaintiff had coupled with his request for mandatory relief a petition for review of the legality of the commissioner's licensing order (in that he had failed to consider factors specifically required to be considered) the action was one by ordinary process. As a consequence, while the rule to show cause was properly vacated, the plaintiffs should have been permitted to proceed with their suit requesting judicial review of the legality of the licensing.[76]

Rather interestingly, the trial judge had overruled an exception of no right of action based on the lack of standing of the competing savings and loan association plaintiffs and, at the same time, had dismissed the intervention of the new branch charter holders.[77] It could be inferred from the overruling of the exception of no right of action that the trial judge deemed plaintiff to be a "person aggrieved" within the Administrative Procedure Act and that the savings and loan associations, having received their charters, were not persons aggrieved and not entitled to intervention. But it is also to be noted that this provision of the Administrative Procedure Act provides that such relief is granted "without limiting, however, utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law."[78] The First Circuit did not refer to the Act but nevertheless ruled that these interventions should not have been dismissed because the intervenors were indispensable parties who possess rights materially affected and whose right to intervention is provided by the Code of Civil Procedure.[79]

---

74. *Id.* at 269.
75. *Id.*
76. *Id.* at 270.
77. *Id.* at 270-71.
78. LA. R.S. 49:964 (Supp. 1967).
79. Gulf Fed. Sav. & Loan Ass'n v. Sehrt, 233 So.2d 268, 271 (La. App. 1st Cir. 1970).

A Jefferson Parish ordinance, recently interpreted by the Fourth Circuit in *Roberts v. Jefferson Parish Council*,[80] permitted restaurants to operate in areas zoned "C-1" but did not permit the operation of barrooms, nightclubs or lounges—such establishments requiring a "C-2" zoning. The ordinance defined a restaurant as "a retail establishment offering food or beverage or both for consumption on the premises. Restaurants include cafeterias."[81] The parish planning director interpreted the ordinance as permitting a bar or lounge to operate in conjunction with a resturant in a "C-1" classification; as long as it was so operated it was ruled that it could take the form of a sit down type bar, piano bar or service bar.[82] Although temporary permits were issued to an operator on the assumption that there would be compliance with this interpretation, a permanent permit was later refused on the ground that the operation was actually a barroom, nightclub or lounge requiring "C-2" zoning.[83] Nonetheless, the trial judge enjoined the parish from closing the lounge for violation of the zoning ordinance; on appeal his order was affirmed on the basis that "while the facility was primarily a lounge or nightclub it was also clear that the food sales formed a substantial part of the operation."[84]

The case offers an interesting illustration of what can happen when the judiciary pays insufficient attention to the expertise of the agency immediately charged with administering zoning ordinances. In *Roberts*, it seems reasonably clear that the ordinance was designed to permit in "C-1" zoning a bar serving primarily as a waiting area preliminary to being seated at a restaurant table and as a source of drinks served at restaurant tables before and during the course of a meal. With an interpretation of a zoning ordinance which permits compliance to be achieved by a showing that a substantial quantity of food is served in the bar or lounge, a ready means is provided for defeating the purpose of the zoning.[85]

Our licensing provisions for the retail or wholesale sale of beer contain the salutary requirement that applications for both

80. 235 So.2d 131 (La. App. 4th Cir. 1970), *rehearing denied*, June 1, 1970.
81. *Id.*
82. *Id.* at 132.
83. *Id.*
84. *Id.* at 132-33.
85. The Fourth Circuit thought it "irrelevant" that at the trial considerable attention was paid to whether "this was a bar operated in connection with a restaurant, or, on the other hand, a restaurant operated in conjunction with a bar." *Id.*

state and local permits must be made within twenty-four hours of each other, presumably for the purpose of avoiding the use of leverage from the granting of one to obtain the other. Failure to comply may result in denial of the application. Since the language is not mandatory, however, it appears that such a failure may be waived by the licensing authority.[86] Recent litigation before the Third Circuit confirms this implication; in *Rawls Distributing, Inc. v. Vernon Parish Police Jury*[87] a police jury which granted a license but withheld its issuance because the applicant had failed to comply with the dual filing requirements was ordered to issue the license. Presumably the police jury might have refused to grant the license but, having done so and not having rescinded its action within the statutory period for acting on the application, it could not refuse to issue the license on the basis of a failure of compliance.[88]

In the recent case of *Talbert v. Planning Commission*[89] zoning was under attack on the ground that applicants had failed to have the change recommended by the proper commission, having erroneously addressed their application to the planning commission. Thus it was argued that when the city council approved the change in zoning on the basis of a recommendation from the planning commission, it was acting on the recommendation of the wrong body and contrary to the city ordinances. A peremptory exception of no cause of action was sustained by the trial judge. Analysis of the statutes and ordinances by the First Circuit indicated identical personnel for both the planning and zoning commissions but with differing responsibilities; in these circumstances, the exception was overruled and the matter was remanded for trial on the merits.[90] It is of interest that, while application was made to the planning commission, it is possible that appropriate zoning criteria were applied by the commission despite the erroneous entitlement of the application. If the planning-zoning commission did properly apply zoning criteria in the course of making its recommendation, no reversible error would seem to have occurred and the city council would have acted on the basis of a recommendation correct as to substance.

86. LA. R.S. 26:278 (1950).

87. 234 So.2d 480 (La. App. 3d Cir. 1970).

88. LA. R.S. 26:283A (1950). The statute provides that "[t]he decision to withhold a local permit shall be made within thirty-five calendar days of the filing of an application." It is not clear why the action to rescind was not timely here, since the application was filed May 12 and the rescinding action was taken on June 14, a period of 34 days.

89. 230 So.2d 920 (La. App. 1st Cir. 1970).

90. *Id.* at 924-25.