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one Clark, a shareholder, director, and officer of the company, to sign corporate checks as one of the company's two directors required to so sign.[30] Clark, who was personally indebted to the drawee bank on loans relating to a separate business venture, allegedly induced the other authorized cosigner to sign six corporate checks, none of which contained the name of the intended payee, after which Clark inserted the drawee-bank's name as payee. The proceeds of the checks were then applied to the payment of Clark's indebtedness to the bank. The bank, which had mailed monthly statements to the corporation along with the cancelled checks, apparently was unaware that Clark's co-signer had signed the checks prior to the insertion of the bank's name as payee. The Louisiana supreme court held that the bank was in *bad faith* within the meaning of R.S. 9:3805 and 3808 when it received the *first*[31] of the six checks, since it was both the drawee bank and the payee of that check. This fact, said the court, gave the bank clear evidence of a probable misappropriation and gave rise to a duty to inquire as to the validity of the payment. To the bank's argument that the statute has no application where there are two fiduciaries, the court observed that the Statute's definition of "fiduciary" includes "any . . . persons acting in a fiduciary capacity,"[32] and that it could not be said that the co-fiduciary had not violated fiduciary obligations by signing the checks in blank.

PUBLIC LAW

ADMINISTRATIVE REGULATION: LAW AND PROCEDURE

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PUBLIC SERVICE COMMISSION

The statute governing the issuance of certificates and permits to motor carriers contains no provision with respect to

30. The corporation originally gave Clark authority to issue checks on his signature alone. The bank, however, demanded a co-signer.

31. In the absence of prior Supreme Court interpretation of the Uniform Fiduciaries Act, the court relied upon the decision in *Maryland Casualty Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965), which held on similar facts that the bank was liable on all but the first of a series of checks under the same provisions of the Act.

32. LA. R.S. 9:3801(2) (1950).

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amending such certificates except for failure to comply with the law and then only after a notice and hearing. The commission has on occasion, however, utilized a "correction procedure" for the rectification of clerical errors without hearing. In *Herrin Transportation Co. v. Public Service Commission*,[1] the commission utilized such a procedure to "correct" an order granting a contract carrier permit which had become final some twenty-two years previously. The original permit had authorized the transportation of "[h]ousehold goods and office equipment"; "heavy machinery and related articles requiring special handling or services."[2] The alleged correction deleted the word "related" before articles, thus broadening the permit so as to authorize the transportation of all articles requiring special handling or services.[3] Our supreme court found that this was clearly a substantive change in the permit, not the correction of an inadvertent insertion, and hence could issue only after notice and hearing.[4] The court relied upon principles of *res judicata* and lack of statutory authority in holding that the commission was without power to amend an order which had become final through expiration of the appeal. The use of the "correction procedure" in this instance was termed by the court a circumvention of statutory procedures. In *White v. Public Service Commission*,[5] involving the issuance of a certificate to a radio common carrier service, while a hearing had been held, specific findings were not made on the issue of inadequacy of present service; the matter was remanded to the commission. Specific findings were deemed necessary in light of the fact that the record clearly showed competition and duplication of service would result from the order. In these circumstances the court found the statute explicit that a hearing on reasonable notice as to the inadequacy of present service was to be held.[6] In order to insure adequate judicial review the commission was directed to prepare a record containing evidence with respect to adequacy or inadequacy of service and specific findings with respect thereto by the commission.[7] The district court was also found to have committed reversible error in permitting the

1. 261 La. 977, 261 So.2d 635 (1972).
2. *Id.* at 979, 261 So.2d at 636.
3. *Id.*
4. *Id.* at 981, 261 So.2d at 637.
5. 259 La. 363, 250 So.2d 368 (1971).
6. *Id.* at 378, 250 So.2d at 373.
7. *Id.* at 381, 250 So.2d at 374.

introduction of evidence in court without the required stipulation from the parties, waiving prior reference to the commission.[8]

In 1958 the legislature sought to eliminate trafficking in dormant motor carrier certificates and permits by providing that such certificates or permits were subject to cancellation upon motion of the commission or other interested party upon nonuse for a period of six months; it also proscribed the transfer of such certificates or permits unless the prior owner had substantially operated all rights thereunder for a period of six consecutive months immediately prior to transfer. However, an exception was provided if "failure to so operate was due to bankruptcy, receivership, or other legal proceedings, or to other causes beyond his or its control."[9] In *Matlack, Inc. v. Public Service Commission*,[10] a permit issued to a subsidiary of Matlack in 1957 was cancelled under the commission's authority with respect to dormant permits. The commission took the position that the permit was subject to cancellation because it had clearly at one time or another been dormant for a period of six months, although the rights under the permit had been substantially operated for a period of a year prior to cancellation.[11] The supreme court viewed the statute as ambiguous in that the same requirements as to substantial operation were not included in the non-user cancellation authorization as in the provision proscribing transfers.[12] To clarify ambiguity, the court concluded, the six months non-user period must immediately precede either the attempted transfer or cancellation by the commission; ambiguity, the court noted, citing encyclopedic jurisprudence, may arise from the fact that "*'giving a literal interpretation to the words would lead to such unreasonable, injust, impracticable, or absurd consequences as to compel a conviction that they could not have been intended by the Legislature.'*"[13]

In *Communications Industries, Inc. v. Public Service Commission*,[14] the supreme court *disposed of* a question left open in the *White* case as to whether a hearing for the serving carrier,

8. *Id.* at 372-73, 250 So.2d at 371-72.
9. LA. R.S. 45:166(B)(c) (1950).
10. 260 La. 359, 256 So.2d 118 (1972).
11. *Id.* at 364, 256 So.2d at 120.
12. *Id.* at 368-69, 256 So.2d at 121.
13. *Id.* (Citations omitted.)
14. 260 La. 1, 254 So.2d 613 (1971).

on the adequacy of present service and ability to provide adequate service if not presently being rendered, must be separate from the hearing on a new application to render duplicating service. The court concluded that one hearing upon reasonable notice was all that was required under the statute.[15]

CIVIL SERVICE COMMISSION

For many years, rules of the Civil Service Commission have provided that a notice of appeal must "contain a clear and concise statement of the action complained against and the basis of the appeal."[16] The rules have also provided for summary dismissal of appeals at the instance of the appointing authority when the "appeal has not been made in the required manner or within the prescribed period of delay."[17] The commission has generally been upheld in its interpretation of the rule that more is required than mere conclusory allegations and that the specific actions upon which the appeal is based must be set forth in the notice of appeal.[18] The procedure of the commission might be said to track generally the requirement of fact pleading in the state courts and to require more than the Federal Rule, which merely prescribes that a claim for relief contain a "short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[19] In *Smith v. Board of Commissioners*,[20] the employee filed notice of appeal complaining that he had "been demoted, dismissed, discriminated against, and subjected to disciplinary action contrary to the provisions of amendment[21] and rules of this commission."[22] He also complained in the notice that he "has been deprived of his rights, discriminated against, and adversely affected by violations of the provisions of the amendment and rules of this commission."[23] The notice of appeal did not deny the truthfulness of the employing authority alle-

15. *Id.* at 8-10, 254 So.2d at 615-16. For a more detailed description of procedure under the Federal Motor Carrier Act, *see* ICC v. J-T Transport Co., 368 U.S. 81 (1961), commented upon in *Symposium*, 32 LA. L. REV. 271, 272 (1972).

16. LA. CIV. SERV. R. 13.11(d).

17. *Id.* at R. 13.14(a).

18. Smith v. Board of Comm'rs, 249 So.2d 279, 281 (La. App. 1st Cir. 1971).

19. 28 U.S.C. R. 8(a)(2) (1970).

20. 262 La. 96, 262 So.2d 383 (1972).

21. LA. CONST. art. XIV.

22. Smith v. Board of Comm'rs, 249 So.2d 279 (La. App. 1st Cir. 1971).

23. 249 So.2d at 280.

gations and did not describe the nature of the discrimination or deprivation of which the employee complained. The court of appeal upheld a dismissal under the rules of the commission on the ground that the notice of appeal had failed to set forth any motive, misconduct, or other action on the part of the employing authority.[24] On review by the supreme court, it was held that "[a]lthough the complaint lacks substantial detail, it is sufficient in our opinion to maintain the appeal."[25] The court rested its action primarily on the ground that it found no requirement in the rules that the notice deny seriatim each pertinent sentence in the letter of dismissal of the employing authority and was satisfied that "[t]he fair import of the notice is that the dismissal was unfounded and erroneous."[26] It quoted from a trial court appeal that "[t]he law is too well settled to require the citation of authority that appeals are favored in the law, must be maintained wherever possible, and will not be dismissed for technicalities."[27] It seems a fair inference that the court so regarded the commission requirement of a "clear and concise statement of the action complained against" and that in agency pleading we may be moving toward the notice pleading of the Federal Rules.

While the *Smith* case was under review by the supreme court, a court of appeal decided *Newbrough v. State, Department of Highways*.[28] There, the Department had dismissed an employee on the ground that he was physically unable to discharge his duties. An appeal was taken to the commission; the appeal was dismissed on the ground that the notice failed to set forth a clear and concise statement of the action complained against in that it did not allege that at the time he presented himself for return to work he was physically able to resume his duties. In this case, notice of appeal took the form of a somewhat confused letter statement of facts but which did include a reference to a doctor's certificate evidencing his ability to return to work. From all of this, the commission was directed by the reviewing court to infer that the notice met the letter and spirit of the rule although not "couched in the most acceptable form of termi-

24. *Id.* at 281.
25. 262 So.2d at 385.
26. *Id.*
27. Emmons v. Agricultural Ins. Co., 245 La. 411, 424, 158 So.2d 594, 599 (1963).
28. 257 So.2d 461 (La. App. 1st Cir. 1972).

nology."[29] Employee was not expected, said the court, to deny or refute all allegations made against him so long as the basis of the appeal is set forth. In *Newbrough*, the commission's pleading requirements with respect to specifically denying or refuting all allegations are thus softened to a requirement analogous to the *Smith* requirement that the notice shall convey a "fair import" of denial, though lacking desirable specificity.

In *Carpenter v. Confederate Memorial Medical Center*,[30] an employee had apparently been harried into signing an instrument which was then treated by the employing authority as a voluntary resignation and was deemed to eliminate the need for a letter of dismissal with a statement of charges that the employee was unable to do the work properly. A notice of appeal recited these circumstances and requested a determination by the commission. The notice was not filed within the requisite 30 days although an informal letter had been addressed timely to the commission; it was dismissed on motion of the employing authority on the ground that the appeal contained no reference to a written notice of discharge and was not timely. The court of appeal reversed the dismissal, noting that it has consistently been held that an employee does not lose his right of appeal within thirty days of only *oral* notification and that such a discharge is totally ineffective.[31] The commission was directed to hear the appeal on the merits.

Waldrop v. Louisiana State University,[32] involved employee's charge that she had been discriminated against in her dismissal. On court review, the argument was rejected that commission's criteria for the determination of job ratings as satisfactory and unsatisfactory were illegal because they were not "objective" standards by which to gauge the qualifications of an employee in comparison with other similar employees. The court found that these criteria, when applied to the adjudicative facts as to quantity of work, quality of work, and adaptability of the employee were adequate although not purely objective standards. The court refused to "weigh" the evidence but found that the record contained evidence which supported the commission's

29. *Id.* at 464.
30. 250 So.2d 161 (La. App. 1st Cir. 1971).
31. Young v. Charity Hospital, 226 La. 708, 77 So.2d 13 (1954), commented on in *Symposium*, 16 LA. L. REV. 282 (1956).
32. 255 So.2d 413 (La. App. 1st Cir. 1971).

finding that employee had failed to establish her charge of discrimination.[33]

A final chapter in the saga of *Cormier v. Board of Institutions*[34] was written by a court of appeal in upholding *mandamus* against the Department of Corrections directing the department to pay Cormier back-salary as well as hospital and living expenses which he would have received had he been allowed to continue in his position.[35] Recovery of the fair value of living expenses which would have been defrayed by the department would seem to pose an interesting income tax question, since if Mr. Cormier was required for the convenience of his employer to live on the premises such fair value of living expenses would not have been taxable income to him. The theory of non-taxability is of course that living on the premises in such circumstances is a part of the service rendered rather than compensation received, since he is deprived of choosing his "life style." If he did not actually render such services, and was not so deprived, it would appear the fair value of such expense would now be taxable.[36]

During the last term, the supreme court had the task, in *Bonnette v. Karst*,[37] of reconciling the mandatory retirement provisions statutorily required under the state employees' retirement system,[38] with the "tenure during good behavior" provided in one of the constitutional municipal civil service systems.[39] A three-judge district court held that the constitutional provision for tenure during good behavior took precedence over a legislative provision for mandatory retirement at age 65 for pension purposes. The supreme court was deeply split on the issue but on rehearing finally construed the constitutional provision for tenure "during good behavior" as not contemplating lifetime tenure but rather tenure which could only be terminated by charges after hearing.[40]

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33. *Id.* at 417.
34. 230 So.2d 307 (La. App. 1st Cir. 1969) commented on in *Symposium*, 31 LA. L. REV. 292, 297 (1971).
35. State Civil Service Comm'r v. Dep't of Corrections, 251 So.2d 524 (La. App. 1st Cir. 1971).
36. Treas. Reg. § 1.119-1(a) (1956).
37. 261 La. 850, 261 So.2d 589 (1972).
38. LA. R.S. 42:691 (1950).
39. LA. CONST. art. XIV, § 15.1(30).
40. 261 La. at 889-94, 261 So.2d at 604-05.

SCHOOL BOARDS

In *Stewart v. East Baton Rouge Parish School Board*,[41] the board "admitted and treated a judgment of divorce on the ground of adultery as evidence of and conclusive proof of immorality," engaging in immoral conduct being a ground for dismissal of tenured school bus operators. On appeal, the employee alleged that dismissal on the basis of such a finding amounted to a deprivation without due process of law inasmuch as the conduct found to constitute immoral conduct had no effect upon or relation to the performance of her job duties and had no effect upon the public interest. The court of appeal treated the issue as only one of "sufficient proof of immorality to justify [the board's] decision," and having found the evidence substantial, refused to interfere further in the discretion of the board, although it seems clear that the constitutional argument was being made that the finding was arbitrary and an abuse of discretion and hence not due process of law.[42] In *Brickman v. New Orleans Aviation Board*,[43] the supreme court held that "inability to work with others" was not a valid cause for dismissal under the civil service law unless it was further explicitly expanded to mean "inability to work with others" in circumstances *where such work quality is "prejudicial to the efficiency of the public service."*[44] By analogy, such an argument might have been made in *Stewart*.

Last term, in *Hayes v. Orleans Parish School Board*,[45] the supreme court ruled that transfers into lesser positions brought about by the termination of federal aid programs were within the general powers of administration of school boards without limitation by tenure restrictions. In *Pardue v. Livingston Parish School Board*,[46] the First Circuit now holds (in circumstances where no curtailment of federal funds was involved but compliance with a faculty integration order was involved) that a guidance counsellor would be demoted and tenure restrictions would be violated if removed from her position and assigned

41. 251 So.2d 487 (La. App. 1st Cir. 1971).
42. *Id.* at 490.
43. 236 La. 143, 107 So.2d 422 (1958) commented on in *Symposium*, 20 LA. L. REV. 268, 272 (1960).
44. *Id.* at 167, 107 So.2d at 431.
45. 256 La. 677, 237 So.2d 681 (1970), commented on in *Symposium*, 32 LA. L. REV. 271, 284 (1972).
46. 251 So.2d 833 (La. App. 1st Cir. 1971).

as an English teacher.[47] The *Hayes* case was not referred to by the court.

In *Bowen v. Doyal*,[48] the supreme court has construed section 36 of article VII of the Louisiana Constitution, delineating the appellate jurisdiction of district courts, so as not to preclude statutorily limited judicial review of agency action upon the record as made before the agency. The present decision overrules *Albert v. Parish of Rapides*,[49] in which the court espoused the theory that a party dissatisfied with agency action was limited to bringing a suit *via ordinaria* under the Code of Civil Procedure. The majority now holds that review may be obtained by filing an original action in the district court which action may depart from an ordinary suit in that limitations on the scope of review imposed by the legislature may be respected.[50] While numerous statutes use the term "appeal" of an administrative order, the court notes that "[j]udicial review of administrative determinations should not be confused with judicial appeals";[51] such writs are to be deemed an invocation of original judicial jurisdiction and hence not proscribed by section 36 of article VII of the Constitution. The court notes the existence of a presumption that all administrative determinations are reviewable by the court and that, in view of due process, "judicial review may even be necessary in the face of legislative attempt to deny it . . . ."[52] Since the Division of Employment Security is exempted from the Louisiana Administrative Procedure Act,[53] that statute was not in issue. However, the decision of the court would seem to apply equally to petitions for judicial review under that act.

In *Heard v. Doyal*,[54] the petition for review was not attacked on the jurisdictional grounds urged in *Bowen*. Error was urged in that employer had not carried the burden of proof by a preponderance of the evidence as to alleged misconduct, relied

47. 251 So.2d at 835.
48. 259 La. 839, 253 So.2d 200 (1971). *See also*, Geystand v. Doyal, 259 La. 862, 253 So.2d 209 (1971).
49. 256 La. 566, 237 So.2d 380 (1970).
50. 259 La. at 848-52, 253 So.2d at 204-05.
51. *Id.* at 852, 253 So.2d at 204.
52. *Id.*
53. LA. R.S. 49:962-64 (1950).
54. 259 So.2d 412 (La. App. 2d Cir. 1972).

upon as a basis for denying benefits. The court did not espouse the preponderance rule but, guided by statute, reached the conclusion that the finding by the agency was not supported by "sufficient" evidence, holding that no evidence whatsoever supported the finding of misconduct.[55] The court quoted approvingly a version of the substantial evidence rule to the effect that "[w]hen the evidence is open to several reasonable constructions, the court should accept the construction or interpretation of the evidence reasonably made by the administrative agency."[56] Since here there was no evidence of misconduct as to which an "interpretation" could reasonably be made by the agency, the court's result could have been reached while still honoring this rule.

Amendments to the Minimum Housing Standards Code for the City of New Orleans[57] authorize officials to determine whether prescribed standards have been violated and, where violations are found, to advise the owner that, upon failure to make necessary repairs, official repair of the premises may be ordered, with the cost of such repairs charged as a lien against the property, subject to collection, with costs, as a special tax. The code provides for service of notice upon the owner and for a hearing with findings of fact to be made in writing and an order served upon the owner requiring correction of defects on pain of the above penalties. In *Tafaro's Investment Co. v. Division of Housing Improvement*,[58] an inspection was had and findings of fact made, but with no opportunity afforded to owner at a duly noticed hearing to answer the allegations resulting from the inspection.[59] The supreme court held that, since a judicial function, *i.e.*, adjudication, was being performed by the agency, procedural safeguards must be observed, including a full evidentiary hearing prior to entry of the order; in entering an order for repairs prior to holding such a hearing the agency acted contrary to constitutional requirements of due process.[60]

55. *Id.* at 414.
56. *Id.*
57. NEW ORLEANS, LA., CODE, § 30-12(2) (1956).
58. 261 La. 183, 259 So.2d 57 (1972).
59. *Id.* at 198, 259 So.2d at 63.
60. *Id.* at 199, 259 So.2d at 63.