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PUBLIC LAW

ADMINISTRATIVE REGULATION: LAW AND PROCEDURE

*Melvin G. Dakin**

CIVIL SERVICE COMMISSION

The legislature has provided that an appointing authority or employee in the classified service subject to the jurisdiction of Municipal Fire and Police Civil Service Boards may take an appeal to a district court in the event of dissatisfaction with a decision of the board.¹ On appeal the district court has jurisdiction to determine whether the decision of the board was "made in good faith for cause"; the notice of appeal must state the grounds for the appeal.² In *Odom v. City of Minden*,³ the Second Circuit Court of Appeal held that a district court is without jurisdiction over the appeal where the notice filed by the city did not allege facts from which it could be deduced that the board had not acted in good faith for cause but instead stated merely that the city acted in good faith in abolishing a classification. The allegation in the notice of appeal that the *city* had acted in good faith for cause could not be interpreted or substituted for the necessary allegation that the *board* had made an error in its decision and had hence not acted for cause.⁴ The rules of the State Civil Service Commission are more specific in that they require that a notice of appeal "contain a clear and concise statement of the action claimed against and the basis of the appeal" and for summary dismissal of appeals at the instance of the appointing authority where the "appeal has not been made in the required manner or within the prescribed period of delay."⁵ In *Duczer v. State Banking Department*,⁶ employee's notice alleged that he had been forced to resign his position for the reason that he was "indebted to institutions under the supervision of the Louisiana Banking Department."⁷ The department filed a motion for summary disposition of the appeal alleging that employee resigned and was not dismissed, submitting in support thereof a rather cryptic letter of resignation from the employee.⁸ The commis-

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1. LA. R.S. 33:2501, 2561 (1950).

2. *Id.*

3. 263 So. 2d 410 (La. App. 2d Cir. 1972), *writs granted*, 262 La. 1077, 266 So. 2d 216 (1972).

4. *Id.* at 412.

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

6. 277 So. 2d 453 (La. App. 1st Cir. 1973).

7. *Id.* at 454.

8. *Id.* at 453.

sion granted the motion but the court of appeal reversed on the grounds that these pleadings were adequate to put in issue whether the employee had been forced to resign and that a hearing must be held on this issue of fact.⁹ A state or city civil service commission is not limited to acting upon appeals; it is also authorized, upon its own initiative or upon written charges by any person, to investigate charges.¹⁰ In *In Re Roberts*,¹¹ a commission investigated, on its own initiative, charges of fraud on the part of an employment applicant. The investigation came some four years after the alleged fraud. The First Circuit Court of Appeal held that while the constitutional provision requires a commission to proceed with its investigation within one year where written charges have been filed, no such limitation applies where the commission is proceeding *ex proprio motu*.¹²

The scope of judicial review of findings of fact by the State Civil Service Commission has been before the court on innumerable occasions. The governing provision is the constitutional requirement that the decisions shall be "final on the facts."¹³ Our supreme court has said that this means the courts may not "inquire into the sufficiency of the evidence to ascertain whether the commission was correct in its finding of fact, and if there is any evidence to support its finding of fact, such finding may not be disturbed."¹⁴ This has been variously referred to as the "any evidence" rule,¹⁵ the "some evidence" rule,¹⁶ the "no evidence" rule,¹⁷ the "reasonable man" test¹⁸ and the "substantial evidence" rule.¹⁹ Whatever the nomenclature, our supreme court has clearly indicated that if the commission finding is supported by evidence, even though another finding more acceptable to the court might also be found to be supported by evidence, the reviewing court may nonetheless not disturb the commission's finding.

9. *Id.* at 454. Presumably, if the resignation was not voluntary, a written notice of dismissal setting forth the basis therefore would be required. See *The Work of the Louisiana Appellate Courts for the 1956-1957 Term—Administrative Law*, 18 LA. L. REV. 79 (1957).

10. LA. CONST. art. 14, § 15(N)(4), (O)(4).

11. 263 So. 2d 452 (La. App. 1st Cir. 1972).

12. *Id.* at 455.

13. LA. CONST. art. XIV, § 15(O)(1).

14. *Leggett v. Northwestern State Coll.*, 242 La. 927, 938, 140 So. 2d 5, 9 (1962).

15. *Bland v. City of Houma*, 264 So. 2d 729 (La. App. 1st Cir. 1972).

16. *McDaniel v. Department of Safety & Permits*, 270 So. 2d 290 (La. App. 4th Cir. 1972).

17. *Parker v. City of Bossier*, 276 So. 2d 375 (La. App. 2d Cir. 1973); *Smith v. Board of Comm'rs*, 274 So. 2d 394 (La. App. 1st Cir. 1973).

18. *Morrell v. Department of Welfare*, 266 So. 2d 559 (La. App. 4th Cir. 1972).

19. *Bland v. City of Houma*, 264 So. 2d 729, 734 (La. App. 1st Cir. 1972).

The preferred language is the "any evidence" language to distinguish it from the "substantial evidence" rule which does entail at least enough weighing of the evidence to satisfy the court that a reasonable man could choose either of two alternatives.²⁰ Despite the fact that a court may feel bound by the constitutional provision not to substitute its judgment as to the weight of the evidence in a commission appeal, it will not permit a commission to ignore evidence in the course of making its findings. Thus, in *Meaux v. Department of Highways*,²¹ the commission had before it an issue as to the number of times per month certain bridges were open, such openings affecting the rate of pay of the employees. There was data in the commission record for a six month period from which average monthly bridge openings could be determined. The commission chose to ignore this evidence except for the last thirty days on the theory that evidence from prior periods concerned possible violations no longer appealable.²² The result was a decision adverse to the appealing employees. To the reviewing court of appeal this procedure was deemed "comparable to a refusal to make a factual decision on the merits such as was encountered in *Blanchard v. New Orleans Police Department . . .*"²³ In the *Blanchard* case the commission was directed to draw those factual conclusions that by a preponderance of the probabilities shown by the record had been established. The analogy is thus that ignoring evidence in the record on the basis of an erroneous view of its authority by the commission was tantamount to not making a finding "by a preponderance of the probabilities shown by the record."²⁴

On the other hand, when the alleged error is with respect to a question of law, the reviewing court is deemed free to fully substitute its judgment. Thus in *Blake v. Giarrusso*,²⁵ the employee argued that the appointing authority was obligated to promote him to existing vacancies because he had been placed on eligibility lists for such vacancies. A court of appeal rejected the contention citing the pertinent civil service rules establishing discretion in the appointing authorities.²⁶ As precedent the court cited *Sewell v. New Orleans Police*

20. *Gervais v. New Orleans P.D.*, 226 La. 782, 787, 77 So. 2d 393, 395 (1954).

21. 274 So. 2d 486 (La. App. 1st Cir. 1973).

22. *Id.* at 488, 489.

23. *Id.* at 489, citing *Blanchard v. New Orleans P.D.*, 210 So. 2d 585 (La. App. 4th Cir. 1968).

24. See *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Administrative Regulation: Law and Procedure*, 31 LA. L. REV. 292, 294, 295 (1971).

25. 263 So. 2d 392 (La. App. 4th Cir. 1972).

26. N.O. CIV. SERV. R. VI, § 2.1.

*Department*²⁷ in which it was noted that appointing authority has "much discretion in choosing employees for promotion certified as eligible from a list. It is not his mandatory duty to promote. Promotions do not take place automatically or as a matter of right"²⁸ In *Digerolomo v. French Market Corp.*,²⁹ the court of appeal also held as a matter of law that there could be no employment in the classified service merely by the fact of employment by a public body; to qualify for the classified service the court held there must be either appointment after certification of eligibility after examination, waiver of such procedure or "blanketing in."³⁰ Again in *Alonzo v. Louisiana Department of Highways*,³¹ a complaining employee alleged illegal action by the commission because only three members of the five-man body heard the case and only two out of the three sitting members found against him. The constitution provides that three members of the commission shall constitute a quorum but does not provide a procedure for decision.³² The court of appeal adopted encyclopedic jurisprudence stating that "the idea of a quorum is that when the required number of persons goes into a session as a body the vote of a majority thereof are sufficient for binding action."³³ In *Hunsinger v. Louisiana Department of Highways*,³⁴ the court of appeal upheld the validity of a civil service rule providing for transfer of a permanent employee upon the mere recommendation of the appointing authority and approval of the director of personnel. Noting that the constitution proscribes only demotion, dismissal or discrimination except for causes expressed in writing,³⁵ the court reasoned that a transfer to a similar or better position at another location was not a demotion and required only a recommendation, not "charges."³⁶

SCHOOL BOARDS

The legislature has sought to achieve fairness in school board

27. 221 So. 2d 621 (La. App. 4th Cir. 1969).

28. *Id.* at 623.

29. 272 So. 2d 385 (La. App. 4th Cir. 1973).

30. *Id.* at 387.

31. 268 So. 2d 52 (La. App. 1st Cir. 1972).

32. LA. CONST. art. XIV, § 15(c).

33. 268 So. 2d at 54; 74 C.J.S. 171 (1951). In *State ex rel. Broussard v. Gauthier*, 265 So. 2d 828 (La. App. 3d Cir. 1972), the same result was achieved where a school board had pursuant to general statutory authority to adopt rules for its governance, provided that meetings be conducted under Robert's Rules of Order.

34. 271 So. 2d 692 (La. App. 1st Cir. 1972).

35. LA. CONST., art. XIV, § 15(N)(1); LA. CIV. SERV. R. 8.15.

36. 271 So. 2d at 694.

discharge procedure by providing that probationary teachers shall have notice in writing of prospective discharge at the expiration of a probationary term and shall be discharged during a probationary term only upon the written recommendation of the superintendent.³⁷ A tenured teacher is of course entitled to notice, written charges, and a full hearing prior to a discharge.³⁸ In *Fleming v. Concordia Parish School Board*,³⁹ there was confusion of these procedures which, while it may have served the public interest, resulted in harshness and possible unfairness to the teacher. In that case a probationary teacher was notified that charges of willfull neglect of duty and incompetency had been preferred against her by her principal and that the superintendent was convening a hearing at which she would have the right to appear with witnesses and counsel. There was no indication that the hearing was to be before the school board with dismissal as a possible outcome rather than a hearing before the superintendent to determine what recommendation he should make to the school board.⁴⁰ The teacher appeared (without counsel) at the hearing and witnesses were heard and cross-examined by the teacher; thereafter at a later reconvened hearing the board found her incompetent and dismissed her.⁴¹ No recommendation by the superintendent was ever submitted as required in the case of dismissal of a probationary employee.⁴² Nonetheless, the Third Circuit Court of Appeal concluded that since she was given and participated in a hearing, although not entitled to one, she had waived any procedural defects and the board's action was in compliance with provisions for dismissal of a tenured employee, hence must also be in compliance with the procedure for dismissal of a probationary employee.⁴³ A dissenting judge would have found the procedure illegal since the teacher's right to a recommendation from her superintendent and her right to know the nature of the hearing which was to be afforded her should not have been deemed waived by her appearance and participation in that hearing.⁴⁴

The scope of review provided in the case of appeals by tenured

37. LA. R.S. 17:442 (1950). Cf. R.S. 17:430 (Supp. 1960) (which makes no provision for dismissal of trade school teachers and dismissal could be in any manner authorized by the board). *Garner v. State Bd. of Educ.*, 277 So. 2d 492 (La. App. 1st Cir. 1973).

38. LA. R.S. 17:443 (1950).

39. 275 So. 2d 795 (La. App. 3d Cir. 1973).

40. *Id.* at 797.

41. *Id.*

42. *Id.*

43. *Id.* at 800.

44. *Id.* at 803.

school teachers is broader than in the case of probationary school teachers since the statute provides that there shall be a "full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board, in the matter."⁴⁵ In an earlier school board case our supreme court held that the general rule with respect to review of agency action is applicable. Thus the court has said

when there is a rational basis for an administrative board's discretionary determinations, which are supported by substantial evidence in so far as factually required, the court has no right to substitute its judgment for the administrative board or to interfere with the latter's *bona fide* exercise of its discretion.⁴⁶

In *Jennings v. Caddo Parish School Board*,⁴⁷ the district court, reviewing the record before the school board, concluded that the decision was correct and "fully supported by the evidence." The court of appeal concluded on further review of the record that "the evidence presented in support of [the charge of incapability of organizing and carrying on a constructive educational program] is overwhelming" and affirmed the lower court. While our supreme court has said there is "no right to substitute . . . judgment for the administrative board,"⁴⁸ it seems arguable that the legislature has vested such power in the court in giving it the power to conduct a full hearing and to affirm or reverse rather than merely remand.⁴⁹ The legislature in making provisions for review of school board action would seem to have intended the broadest scope of review applicable to agency action⁵⁰ short of trial *de novo*.

*Pardue v. Livingston Parish School Board*⁵¹ presents another facet of a controversy which was before a court of appeal last term. In that case⁵² the court had earlier held that a guidance counselor

45. LA. R.S. 17:443 (1950).

46. *Lewing v. DeSoto Par. School Bd.*, 238 La. 43, 53-54, 113 So. 2d 462, 466 (1959). See *The Work of the Louisiana Appellate Courts for the 1958-1959 Term—Administrative Law*, 20 LA. L. REV. 268, 275 (1960).

47. 276 So. 2d 386 (La. App. 2d Cir. 1973).

48. *Lewing v. De Soto Par. Sch. Bd.*, 238 La. 43, 54, 113 So. 2d 462, 466 (1959).

49. LA. R.S. 17:443 (1950).

50. In *Lewing*, it was held that the review is only on the record insofar as the school board is concerned but the teacher has the right to introduce additional evidence if she chooses to do so. 238 La. at 52, 113 So. 2d at 465.

51. 276 So. 2d 901 (La. App. 1st Cir. 1973).

52. *Pardue v. Livingston Par. School Bd.*, 251 So. 2d 833 (La. App. 1st Cir. 1971). See *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Administrative Regulation: Law and Procedure*, 33 LA. L. REV. 259, 266-67 (1973).

would be demoted and tenure restrictions would be violated if removed from her counselor position and reassigned as an English teacher; the court enjoined the board against so acting.⁵³ Despite the injunction, the school board failed to retain her in a guidance counselor position and the teacher prayed that the board be ordered to show cause why it should not be held in contempt. After hearing, the trial court's response was an order of reinstatement as guidance counselor in a specific school. The court of appeal now holds that there should have been a trial *via ordinaria* prior to such a judgment since the original injunction provided only for retention as a guidance counselor and did not invade the board's jurisdiction to allocate personnel within the school's system.⁵⁴ Presumably a writ of mandamus would issue after ordinary proceedings to return the teacher to a position of guidance counselor *somewhere* in the school system. However, such a writ would not lie to order her return to a specific school in the system, since this would invade the discretion of the board.⁵⁵

*Reeves v. Orleans Parish School Board*⁵⁶ sought to compel school board meetings to be conducted in public except insofar as the statutes provide for recessing a public meeting for the purpose of conducting a closed or executive recess. The court of appeal held such statute permissive only and does not preclude a board from holding closed or executive meetings so long as no final or binding action is taken at such meetings.

DIVISION OF EMPLOYMENT SECURITY

Employees or employers appealing from an adverse decision of the Division of Employment Security enjoy a broader scope of review than appellants from the Civil Service Commissions.⁵⁷ It is, however a review on the record and the taking of additional evidence at the trial court level is prohibited; any additional evidence must be taken

53. 251 So. 2d at 835.

54. 276 So. 2d at 904.

55. *Accord*, *White v. Board of Trustees*, 276 So. 2d 714 (La. App. 1st Cir. 1973). The court of appeal has again noted that a mandamus would not lie to compel a public official or board to perform a discretionary act. In that case the writ did issue, since the court held an increase in retirement benefits ordered by the legislature was remedial legislation involving only purely ministerial action on the part of the Board of Trustees.

56. 264 So. 2d 243 (La. App. 4th Cir. 1972), *writ granted*, 262 La. 1165, 266 So. 2d 446 (1972).

57. See *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Administrative Regulation: Law and Procedure*, 33 LA. L. REV. 259, 267 (1973).

before the agency.⁵⁸ Thus, since *Walsworth v. Heard*⁵⁹ was decided it has been the rule that no judgment on review may be pronounced prior to the filing of the record by the division; a default judgment in the absence of the filing of such record is not permitted.⁶⁰ Nonetheless there was a flurry of cases last term in which default judgments were entered by trial courts because of delay in the filing of such administrative records; in all, the *Walsworth* holding was adhered to, a court of appeal noting that there was nothing before the trial court from which it could determine whether the findings of the agency were "supported by sufficient evidence," the permitted judicial review under the statute.⁶¹ One court of appeal announced again that the proper procedure, in the event of delay on the part of the division in filing the record, was either to proceed by a rule for contempt or through mandamus proceedings.⁶²

ALCOHOLIC BEVERAGE CONTROL BOARDS

A review of decisions of the Alcoholic Beverage Control Boards affords the broadest judicial reconsideration short of a jury trial. Appeals are to be filed as ordinary suits tried *de novo*, with each party free to amend and supplement pleadings and call additional witnesses. Appeals are devolutive in nature but a prayer for injunctive relief may accompany appeals.⁶³ In *Felton v. Alcoholic Beverage Control Board for City of Baton Rouge*,⁶⁴ the suit was deemed injunctive in nature but the appeal court nonetheless held that the suit could be considered an appeal within the contemplation of the statute although deemed untimely for failure to file within a period of ten days from notification of the board's decision.⁶⁵ Full substitution of judgment prevails also on appeals from district court determinations. Thus, in *Smith v. Louisiana Board of Alcoholic Beverage Control*,⁶⁶ the court of appeal determined for itself whether a licensee had taken reasonable affirmative action to prevent frequenting of a bar by

58. LA. R.S. 23:1634 (1950).

59. 84 So. 2d 254 (La. App. 2d Cir. 1955).

60. *Id.* at 256.

61. *McBride v. Doyal*, 276 So. 2d 394 (La. App. 2d Cir. 1973); *Sykes v. Doyal*, 265 So. 2d 780 (La. App. 2d Cir. 1972); *Cameron v. National Air., Inc.*, 264 So. 2d 803 (La. App. 4th Cir. 1972).

62. *Cameron v. National Air., Inc.*, 264 So. 2d 803, 805 (La. App. 4th Cir. 1972).

63. LA. R.S. 33:4788 (1950).

64. 278 So. 2d 136 (La. App. 1st Cir. 1973).

65. *Id.* at 137.

66. 266 So. 2d 543 (La. App. 4th Cir. 1972).

minor youths.⁶⁷ In *State ex rel. Roshto v. Young*,⁶⁸ the Third Circuit affirmed revocation of a liquor license but evidenced displeasure with the harshness of the penalty imposed for a proven violation in allowing minors on the premises. Since no alternative to outright reversal of the revocation was urged, however, the court affirmed the action as within the authority of the board and not arbitrary and capricious. In *Schwegmann v. Louisiana Board of Alcoholic Beverage Control*,⁶⁹ the court of appeal determined, in agreement with a district court, that there was intent "in good faith to carry on a bona fide wholesale liquor business" and applicant was hence entitled to a license.⁷⁰ In *Hargett v. Village of South Mansfield*,⁷¹ a court of appeal agreed with a district court that the information furnished to the village was in compliance with applicable statutes and that, absent a village ordinance requiring it, no affidavit of qualifications from applicant's manager was required for a local permit even though a state permit did so require.⁷² Presumably, the lack of such a requirement for a local permit was based on a lesser need for an affidavit because knowledge of a local manager would be otherwise available.⁷³

CONSTITUTIONAL ISSUES

In *Joint Legislative Committee v. Strain*,⁷⁴ a majority of our supreme court interpreted the action of the legislature as vesting the plaintiff committee with the power to bring criminal contempt proceedings against members as well as non-members of the legislature who refuse to testify before the committee.⁷⁵ This result was reached

67. *State ex rel. Plaia v. Louisiana State Board of Health*, 275 So. 2d 201 (La. App. 3d Cir. 1973), is illustrative of circumstances in which a narrower scope of review than full substitution of judgment could have resulted in gross injustice. The Registrar of Vital Statistics had relied upon records and documents using the terms "mulatto," "colored," and "free person of color" and had inferred that such terms meant ½ Negro blood in an ancestor although the terms are undefined in the statute. Combining broad review with imposition of a burden of proof of "no room for doubt," where a record change from the Caucasian race to another race is proposed, a court of appeal reversed a lower court approval of the change on the ground that the burden of proving a descendant child had 1/32 Negro blood had not been carried; hence no record change was warranted. On the other hand, there was clearly "some evidence," a limitation on review which might have carried the day for the Registrar.

68. 265 So. 2d 261 (La. App. 3d Cir. 1972).

69. 266 So. 2d 744 (La. App. 4th Cir. 1972).

70. *Id.* at 744-45.

71. 271 So. 2d 378 (La. App. 2d Cir. 1972).

72. *Id.* at 382-83.

73. Compare LA. R.S. 26:79(B) (1950) with LA. R.S. 26:279(B) (1950).

74. 263 La. 488, 268 So. 2d 629 (1972).

75. *Id.* at 638-39.

although the constitutional provision referred to in the legislative resolution⁷⁶ deals only with non-members of the legislature. This provision, which generally empowers the legislature to punish its own members for disorderly conduct and contempt was not referred to in the resolution.⁷⁷ The fact that the proceeding was initiated by counsel for the Joint Legislative Committee for a show-cause order and not by a district attorney under a bill of information, did not deter the majority; it found the proceeding to be a non-appealable, criminal contempt, hence subject only to the supervisory jurisdiction of the supreme court.⁷⁸ This somewhat strange result was deemed to follow from the fact that the committee was legislative in function, possessing powers inherent in the legislature, such powers having been delegated to it by legislative resolution.⁷⁹ The power to subpoena fellow-members of the legislature and to subject them to criminal contempt proceedings in the event of failure to respond would appear to be a power of such moment that it should not be implied but be specifically spelled out; this seems particularly so when the criminal proceeding takes the form of summary punishment by rule invoked by the committee rather than a district attorney.⁸⁰

The extent to which police personnel may be required to answer questions respecting potential criminal activity was put in issue in *Dieck v. Department of Police*.⁸¹ In that case an officer was requested to take a second polygraph test because an initial test had been unsatisfactory. The proposed questions were furnished in advance of examination and were deemed warranted and reasonable. In these circumstances, failure on the part of the officer to submit to the test was deemed to warrant dismissal; such dismissal was not an impermissible burden on the privilege against self-incrimination even though the officer considered himself a criminal suspect, in view of the fact that the questions related specifically to the performance of official duties.⁸²

In *Louisiana State Bar Association v. Ehmig*,⁸³ that association recommended to our supreme court that a member of the association be suspended from the practice of law on the ground that he had been

76. LA. CONST. art. III, § 10.

77. 268 So. 2d at 632.

78. *Id.* at 635.

79. *Id.* at 636.

80. *Id.* at 641 (dissenting opinion).

81. 266 So. 2d 500 (La. App. 4th Cir. 1972).

82. *Id.* at 503. See also *Garrity v. State of New Jersey*, 385 U.S. 493 (1967)(cited in concurring opinion).

83. 277 So. 2d 137 (La. 1973).

convicted of a serious crime. The member had been convicted of a violation of the Federal Internal Revenue Code for filing a fraudulent "return, statement, or other document."⁸⁴ Association Articles of Incorporation defined a serious crime as "a felony or any other crime, the necessary element of which as determined by the statute defining such crime, reflects upon the attorney's moral fitness to practice law."⁸⁵ No hearing was held prior to the recommendation of suspension and the member moved that the order of suspension be revoked on the ground that the due process provisions of the federal and state constitutions had been violated.⁸⁶ The motion was granted on the ground that due process of law required a hearing addressed to the issue of whether or not a "serious crime" had been committed.⁸⁷ A dissenting justice suggested that such a hearing would avail the claimant nothing since the certificate of conviction coupled with the language of the statute under which the conviction was had (which defined the crime as a felony) was all that was needed; all issues of fact and law to which a hearing might be addressed were thus already resolved.⁸⁸

In *North Carolina v. Pierce*,⁸⁹ the United States Supreme Court held that in the absence of an impelling reason reflected by the record, a tribunal could not impose a more severe sentence after a new trial, since to do so would violate due process of law guarantees of the United States Constitution. Specifically that court noted that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial . . . due process . . . requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."⁹⁰ In *In Re Coppola*,⁹¹ a commission on government ethics suspended a state police officer for a period of thirty days for violation of an ethics code. After judicial review the matter was remanded to the commission to remedy procedural defects in the initial proceedings. On further proceedings the commission made an additional charge and found all charges established; it then changed its sanction from suspension for thirty days to demotion in rank for a

84. *Id.* at 138.

85. *Id.*

86. *Id.* at 139.

87. *Id.* at 140.

88. *Id.* at 140-41. *Cf.* *Thomas v. Ruffin*, 270 So. 2d 224 (La. App. 1st Cir. 1972) (agency hearing involving disputed inferences of fact).

89. 395 U.S. 711 (1969).

90. *Id.* at 725.

91. 270 So. 2d 190 (La. App. 1st Cir. 1972), *writ granted*, 272 So. 2d 373 (La. 1973).

period of a year (later amended to demotion for a period of six months). The court of appeal held that the punishment imposed on rehearing was in excess of that initially imposed and hence violated the principles set out in the *Pierce* case since the record was devoid of any "impelling reason" for the imposition of a greater penalty.⁹² The court noted that "such a procedure chills the exercise of basic constitutional rights . . . by putting a high price on appeal in violation of due process of law."⁹³

PUBLIC SERVICE COMMISSION

In *Central Louisiana Telephone Company v. Louisiana Public Service Commission*,⁹⁴ our supreme court examined the constitutional history of article VI, § 35 providing injunctive relief only against rate orders of the commission and concluded that it was not the intent of the constitutional draftsmen to exclude non-rate orders from such relief on the principle of *inclusio unius est exclusio alterius*.⁹⁵ The section was drafted to supplant a provision suspending penalties for violation of rate orders during court "contestation" and, a majority held, should not be the basis for an implication that only rate orders could thereafter be enjoined since no other constitutional provision specifically precluded the injunction of non-rate orders.⁹⁶ A dissenting justice argued that there was a rational basis for providing an injunction against a rate order causing revenue deficiencies which could not later be remedied whereas a non-rate order would have no such direct effect on revenues.⁹⁷

92. *Id.* at 193.

93. *Id.* It is to be noted, however, that a right of review as such is not in every instance assured by virtue of the due process clause. The United States Supreme Court has said only that where it is afforded it may not be impermissibly burdened in its exercise so that it is discriminatorily afforded. *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). Thus in *Smith v. Dunn*, 263 La. 599, 268 So. 2d 670 (1972), our supreme court affirmed the dismissal of mandamus proceedings brought for the purpose of requiring a parole board to state the reasons for its denial of parole. It was noted that the legislature could properly provide that there be no appeal from a board's decision on the granting or refusing of parole and that the administrative procedure act could not be construed to provide such an appeal as a matter of administrative procedure. *Id.* at 671. The court concluded that the Board of Parole is not the sort of agency or board contemplated as subject to such general law. The court also rejected *amicus curiae* argument that it would be a denial of due process to refuse even the *privilege* of parole without a disclosure of reasons since this constitutional issue, if such it was, had not been properly raised. *Id.* at 672.

94. 262 La. 819, 264 So. 2d 905 (1972).

95. *Id.* at 826, 264 So. 2d at 907.

96. *Id.* at 828, 264 So. 2d at 908.

97. *Id.* at 848, 264 So. 2d at 915.

*Truck Service, Inc. v. Louisiana Public Service Commission*⁹⁸ presented our supreme court with another opportunity to strengthen its position of limited judicial review for decisions of the commission. In a case involving an additional certification of a motor carrier over a route where there was an existing certification, a trial court had held that there was no evidence that the public convenience and necessity would be "materially promoted" by such new certificate.⁹⁹ A witness for the shipper had testified that the new applicant could perform the projected intrastate hauling since it had extensive interstate experience in hauling the commodity. The certificated carrier, on the other hand, had performed no hauling of the commodity whatsoever, although it had subcontracted some hauling of the commodity under its certification. In these circumstances, the trial court was in error in holding that there was no evidence that the public convenience and necessity would be materially promoted; there was only no evidence that the existing certificate holder was not capable of hauling the commodity.¹⁰⁰ The court quoted approvingly from a prior decision that "if the applicant adduces evidence before the Commission which clearly shows that the public convenience and necessity would be materially promoted by the issuance of the certificate, it is immaterial whether the evidence making this clear showing is termed adequate or is termed 'substantial.'"¹⁰¹ Thus, it was sufficient that there was some evidence introduced from which the commission could reasonably draw its conclusion. The reviewing court was charged with upholding the order whether or not on like evidence the court would have made a similar ruling.¹⁰²

Another articulation of the rule of limited judicial review to decisions of the commission was presented in *Hendrix v. Louisiana Public Service Commission*.¹⁰³ Under existing statutes where a Pilot Fee Commission is unable to agree upon a revision of existing rates the commissioners may certify the issue to the Public Service Commission and the decision of that commission will constitute the decision of the pilotage commission.¹⁰⁴ The court found evidence in the record to sustain an increase in the fees charged by bar pilots and to sustain a higher fee schedule for bar pilots than for other river pilots. The

98. 263 La. 588, 268 So. 2d 666 (1972).

99. *Id.* at 594, 268 So. 2d at 668.

100. *Id.* at 595, 268 So. 2d at 668.

101. *Id.* at 594, 268 So. 2d at 668.

102. *Id.* at 598, 268 So. 2d at 669, citing *Rubion Trans. and Stor. Co. v. Louisiana Pub. Serv. Comm.*, 240 La. 440, 123 So. 2d 880 (1960).

103. 262 La. 420, 263 So. 2d 343 (1972).

104. LA. R.S. 34:1121-27 (SUPP. 1968).

court noted that a reviewing court is to ascertain only whether, in fixing rates and charges, the Public Service Commission was arbitrary and capricious and rendered its order unsupported by evidence; in the absence of such circumstances, the trial judge committed error in substituting his judgment for the commission's.¹⁰⁵

In *Southern Pacific Transportation Co. v. Louisiana Public Service Commission*,¹⁰⁶ our supreme court reviewed a record containing evidence of a holding either way but with the railroad urging that the holding for the commission constituted an abuse of discretion. Specifically, the Commission approved a right of way request over railroad tracks which the railroad contended was less suitable and convenient to it and the public than the right of way it proposed. The site approved was one readily coordinated with donated rights of way from nearby landholders whereas funds for a crossing elsewhere were unavailable. In these circumstances, the decision of the commission could not be deemed an abuse of discretion as may have been the case in *Kansas City Southern Railway Co. v. Louisiana Public Service Commission*,¹⁰⁷ where the site approved by the commission was potentially hazardous to the public and not merely less suitable and convenient than another site urged by the railroad.

In 1971 South Central Bell Telephone Company was granted an increase in tariffs to yield 7.925 per cent on average intrastate net investment but within the year petitioned the commission for an increase to 9.5 per cent. As an interim measure it petitioned for an immediate increase in tariffs on the ground they had failed to yield the granted 7.925 per cent. It urged that tariff increases to accomplish this result could be granted without hearing since they would do no more than assure an approved rate of return. The commission referred the supplementary petition to the hearings on the primary petition and the utility appealed. In *South Central Bell Telephone Co. v. Louisiana Public Service Commission*,¹⁰⁸ our supreme court agreed with a district court that the utility is not entitled to any such automatic rate increases and that the earned returns of 7.4% for 1971 and 6.33% of 1972 do not constitute confiscation.¹⁰⁹ The court conceded that the utility should, perhaps, receive a higher rate of return on its investment and would then be entitled to have the commission fix tariffs which would produce such a return. However, the commis-

105. 262 La. at 441-42, 263 So. 2d at 350-51.

106. 262 La. 391, 263 So. 2d 333 (1972).

107. 254 La. 160, 223 So. 2d 132 (1969).

108. 272 So. 2d 667 (La. 1973).

109. *Id.* at 669.

sion was entitled to examine new test period data preliminary to granting any increase; the noted rates of return which would be in effect during the interim period were not deemed tantamount to confiscation.¹¹⁰ Dissenting justices urged the granting of the petition on the ground that confiscation may take place despite the fact that the company is not yet operating at a loss, citing in support thereof the *Federal Power Commission v. Hope Natural Gas Co.*¹¹¹ and *In Re Permian Basin Area Rate Cases*¹¹² where it was said the test of confiscation was whether the commission saw to it "that the amount after expenses remaining for the investor can reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risk they have assumed and yet provide appropriate protection to the relevant public interest both existing and foreseeable."¹¹³ The dissent failed to note, however, that the cited cases, together with the *Federal Power Commission v. Natural Gas Pipeline Co.*¹¹⁴ case, represented an abandonment of older confiscation notions which had developed incident to the use of the eminent domain analogy in utility rate fixing and an espousal of the reasonableness or due process test cited above.¹¹⁵ Under the due process test it is apparent that the regulating body may achieve reasonableness over a relatively extended period; on the other hand, under the eminent domain analogy pursuant to which the confiscation language was used, failure to earn a fair return on the fair value of the properties was deemed to be confiscatory for whatever period in which it occurred.¹¹⁶

110. *Id.*

111. 320 U.S. 591 (1944).

112. 390 U.S. 747 (1968).

113. *Id.* at 792.

114. 315 U.S. 575 (1942).

115. See Dakin, *The Changing Nature of Utility Rate Regulation*, 36 TUL. L. REV. 401, 434-35 (1962).

116. *Id.*