Louisiana Law Review

Volume 34 | Number 2
The Work of the Louisiana Appellate Courts for the 1972-1973 Term: A Symposium
Winter 1974

Public Law: State and Local Government

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STATE AND LOCAL GOVERNMENT

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OFFICERS AND POWERS

The recent flurry of rural hospital building prompted by the availability of federal funds[1] has brought in its wake an expectable maneuvering for the political posts involved. *Giammanco v. Pizzolato*[2] is illustrative. Existing state legislation gave the power to appoint and remove commissioners of hospital service districts to the appropriate police juries; pursuant thereto, appointments to commission posts were made by the police jury of the parish of St. Charles.[3] The police jury then had second thoughts about two of its appointees and sought to remove them by a simple two-thirds vote of the membership of the police jury. On judicial review, the Fourth Circuit held that the legislature intended removal only for cause, not, as was argued, removal by a two-thirds vote *or* for cause *or* both.[4] A constitutional attack on the statute on the ground that the title contained no reference to removal for cause was rejected, the court reasoning that under the constitutional requirement a title need only be indicative of the statute's object and not an index to, or as extensive as, the act itself.[5]

In *Edwards v. Munster*,[6] the Governor had made appointments to the Board of Commissioners of the Lake Borgne Basin Levee District. Thereafter the newly constituted board met, appointed a president, and discharged the then secretary of the board. The discharged secretary refused to give up the books and records to the newly elected president and the board sought mandamus to turn over or show cause to the contrary. A district court permitted the discharged secretary to introduce evidence of the illegal composition of the board but refused to allow petitioners to introduce evidence of their appointment; on appeal the reviewing court determined that the discharged secretary, not a member of the board, had no right to raise issues other than his claim to be secretary.[7] Since no claimants to membership had appeared in the suit to attack the right of the new

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1. *See, e.g.*, "Medical Facilities Construction and Modernization Amendments of 1970", Pub. L. No. 91-296, 84 Stat. 336 (1970) (codified in titles 12, 21, 42 U.S.C.).

2. 275 So. 2d 880 (La. App. 4th Cir. 1973).

3. LA. R.S. 46:1053 (1950).

4. 275 So. 2d at 882-83.

5. *Id.* at 883-84.

6. 269 So. 2d 580 (La. App. 4th Cir. 1972).

7. *Id.* at 582.

members to hold office and the discharged secretary was deemed without status to litigate the rights of any such claimants, the matter was remanded to the trial court solely for the purpose of trying the issue as to turning over of the records. A proper showing of color of title to the office was deemed all that was necessary to support such a turn over order.[8]

In 1969, Louisiana adopted a so-called riot control act authorizing the chief executive officer of a political subdivision to request the governor to proclaim a state of emergency within the political subdivision; upon proclamation the chief law enforcement officer of the political subdivision was authorized to promulgate such emergency measures as curfew orders.[9] In *State v. Gauthier*,[10] our supreme court held that the statute may not be construed to authorize the mayor-president, who would be the chief *executive* office of East Baton Rouge as a political subdivision, to promulgate a curfew order; that could be done only by the chief of police as the chief *law enforcement* officer for the political subdivision pursuant to the statute. As a consequence the court affirmed a trial court judgment quashing a bill of information against the defendant, for violation of a curfew order, since the order was beyond the authority of the mayor-president to issue.[11]

The Department of Highways (representing predecessor Board of Highways) compromised a claim for interest on deposits on the basis of its general powers as a separate legal entity including the right to sue and be sued. In *State ex rel. Guste v. Board of Highways*,[12] the attorney general sought to restrain the board and department from utilizing the funds received in settlement on the theory that final responsibility to settle disputes involving state agencies rested with the Attorney General pursuant to constitutional provision. In a decision affirming a district court dismissal of the attorney general's suit the First Circuit recognized the general powers of the Attorney General under the constitutional provision as to all legal matters in which the state has an interest. It followed prior jurisprudence, however, in holding that where there is no allegation that a department, recognized as a separate legal entity, has willfully violated public policy of the state without action to correct the violation or has taken action potentially tainted with fraud, the Attorney General has failed to state a cause of action under the constitutional provision permitting

8. *Id.* at 582-83.
9. LA. R.S. 14:329.6 (Supp. 1969).
10. 263 La. 678, 269 So. 2d 204 (1972).
11. *Id.* at 682, 269 So.2d at 206.
12. 275 So. 2d 207 (La. App. 1st Cir. 1973).

him to supplant the department.[13] The district court was also affirmed in its refusal as untimely a post-judgment amended petition requesting that the funds be paid into the state treasury.[14]

By statute, all bidders making proposals to furnish services or materials to a public body are bound by published specifications and where there is a substantial variance between specifications and bid, the bid must be rejected; the law also precludes post-bid changes in specifications.[15] In *Toye Brothers Yellow Cab Co. v. City of New Orleans*,[16] the court of appeal reviewed and approved similar procedures used by the city in awarding a franchise for airport transportation. Forms utilized by the city provided *inter alia* a bid proposal and required a separate document setting forth the qualifications of the bidder and a further document setting forth the general terms and conditions for the airport service. An unsuccessful bidder attacked the award on the ground that the winner's original bid did not comply with published specifications in failing to set forth *as a part of the bid proposal* that he had the necessary facilities and was fully competent and experienced in the service.[17] The court held that while such qualifications might have been made a part of the published specifications, it was not sacramental that this be done and that the information could properly be furnished separate and apart from the bid proposal; the court thus found that there was no substantial variance between specifications and bids and that consideration of the background information was a matter for the exercise of the agency discretion.[18] The court would not substitute its judgment for a good faith judgment of an agency on such matters but would only insure that the discretion was exercised in a fair and legal manner and not arbitrarily; absent proof of an abuse of discretion the court found no error in the granting of the franchise.[19]

In *Walker v. Louisiana Expressway Authority*,[20] the Fourth Circuit upheld the validity of the "north-south" toll road legislation and implementing resolutions by the authority against attacks on its constitutionality based on the act having more than one object and a title not indicative thereof.[21] The attack on the resolution finding financial

13. *Id.* at 213-14.

14. *Id.* at 214.

15. LA. R.S. 38:2211 (1950), *as amended by* La. Acts 1952, No. 370 § 1; 1954, No. 589 § 1; 1970, No. 274 § 1.

16. 264 So. 2d 768 (La. App. 4th Cir. 1972).

17. *Id.* at 770.

18. *Id.* at 771-72.

19. *Id.* at 772.

20. 274 So. 2d 716 (La. App. 4th Cir. 1973).

21. *Id.* at 720.

feasibility centered on the alleged illegal inclusion of a ten per cent contingency fund as an immediate increase of the sum authorized by the legislature.[22] The court rejected the argument that this was intended only to protect against cost overruns after actual construction was underway.[23] The court also rejected attacks on the computation of interest during construction, finding the method and elements used in the calculation reasonable, though obviously the result of expert appraisals by financial consultants.[24] The design as well was found reasonable except for the width of median which required increase to 64 feet to conform to the act which required "design . . . at least comparable to those of existing interstate routes currently in use . . . ."[25] In approving the reasonableness of projected revenues, the court noted that

> we do not serve our function in reviewing administrative factual findings by selecting the better of two expert opinions based primarily on judgment. We simply use the opinion of the attacking expert to assist us in our determination of whether the administrative finding was without foundation in fact. Using this standard, we find that plaintiffs have failed to successfully attack the study's conclusions as to the impact of the system on economic growth.[26]

ELECTIONS

Louisiana jurisprudence has adhered to the doctrine that all elections and all matters relating to political rights strictly belong to the political department of the government, and are therefore beyond the control of the judicial power in the absence of special constitutional or statutory authority.[27] To further minimize the interference with the political processes, except where the qualification of a candidate is questioned, the courts have construed the statutes as providing for only post-election judicial review of irregularities or fraud and such review only as to alleged irregularities which would change the outcome of the election.[28] This approach was adhered to in *Keating v.*

22. *Id.* at 723-24.
23. *Id.* at 724.
24. *Id.* at 729.
25. *Id.* at 730-31.
26. *Id.* at 732.
27. Leblanc v. Democratic State Cent. Comm., 229 La. 556, 86 So. 2d 192 (1956).
28. Treadway v. Plaquemines Par. Demo. Comm., 193 So. 609 (La. App. 4th Cir. 1940), *construing* predecessor of LA. R.S. 18:364 (1950).

St. John the Baptist Parish Democratic Executive Committee[29] where an irregularity was complained of in connection with the appointment of election commissioners without setting forth full information as to addresses, wards and precincts. A suit filed prior to the election was held premature and it was noted that even post-election suits would not be entertained if they did not allege an irregularity which would change the outcome of the election.[30] A concurring judge called attention to injunction or other remedial writs being available for the correction of irregularities *at any time* and would have permitted the suit.[31]

In *Cooper v. Broussard*,[32] the First Circuit construed the time limit within which an election might be contested (expressed as "within two days after official promulgation . . . by respective committees . . . ."[33] as requiring the suit to be filed within 48 hours of announcement of the results by the appropriate committee, *not* when certification of the result of the election was made to the Secretary of State.[34] This was deemed in keeping with prior jurisprudence that the purpose of promulgation was to give notice; announcement by the committee was deemed to serve this purpose.[35]

The statutory time limitations on filing as an independent candidate for office were reviewed in *Courtney v. Martin*.[36] While the statutory language is unclear, the court concluded that an independent seeking nomination in a general or regular election would have filed timely if his papers were filed prior to a second primary but that this would not be the case where the candidate was seeking nomination in an election to fill a vacancy. In the latter case, the statutes provide that nomination papers must be filed on or before the date of the first primary.[37] A plausible case, on the basis of statutory construction, was made for the more stringent requirement being applicable only to vacancies occurring as to presidential electors since the limitation appears in a paragraph clearly directed only to such electors;[38] it was rejected on the somewhat specious ground that this was the only

29. 265 So. 2d 655 (La. App. 4th Cir. 1972).

30. *Id.* at 657.

31. *Id.* at 657-58. It is to be noted however that a petition for injunction would entail an allegation of irreparable injury and inadequacy of the remedy normally provided. LA. CODE CIV. P. art. 2601.

32. 266 So. 2d 549 (La. App. 1st Cir. 1972).

33. LA. R.S. 18:364(H) (1950).

34. 266 So. 2d at 551.

35. *Id.* at 552.

36. 267 So. 2d 595 (La. App. 1st Cir. 1972).

37. LA. R.S. 18:627 (1950), *as amended by* La. Acts 1952, No. 43 § 1.

38. *Id.*

language in the general election law addressed specifically to filling vacancies and hence must apply.[39]

REFERENDUMS

A number of cases involving procedural issues in the conduct of referendums reached the courts of appeal during last term including *Crews v. Cappell*[40] where injunctive relief was sought against a local option stock law, claiming irregularities in the petition for a referendum election. No specific statutory provisions governed judicial review of the matter[41] and the court accorded review by analogy from other local option laws in Louisiana and neighboring states.[42] As noted, irregularities in elections generally must be raised in a post-election suit and then only if the outcome of the election could be affected thereby;[43] as to the referendum here, the court ruled that post-election challenge of irregularities in procedures preceding election would not be permitted on the basis of mere technical irregularities which could have been raised prior to the election; here failure on the part of some fifteen per cent of petitioners to date their signatures.[44]

A court of appeal has indicated a willingness to uphold a legislative cure of deficiencies in a home rule charter adopted by referendum in *Gautreaux v. City of Baker*.[45] A city court was inadvertently created in a home rule charter prior to constitutionally required specific authorization by the legislature; thereafter, the legislature adopted a ratifying and confirming statute and proposed a constitutional amendment to ratify and confirm the court as well.[46] Although the amendment was defeated, in view of the constitutional authority in the legislature, the court of appeal held that legislative ratification was adequate to validate the creation of the city court in the home rule charter.[47]

In *Charter Commission of the City of Alexandria v. Karst*,[48] our supreme court was unwilling to construe a statutory grant for creation of a charter commission charged with submission of a charter within

39. 267 So. 2d at 598.
40. 277 So. 2d 150 (La. App. 3d Cir. 1973).
41. LA. R.S. 3:3001-14 (Supp. 1958).
42. 277 So. 2d at 153-54.
43. *See* note 28 *supra*.
44. 277 So. 2d at 154.
45. 270 So. 2d 221 (La. App. 1st Cir. 1972), *cert. denied*, 272 So. 2d 337 (La. 1973).
46. *Id.* at 223.
47. *Id.*
48. 272 So. 2d 348 (La. 1973).

one year after appointment as authorizing the commission to draft a second charter after the year had expired and the electorate had rejected a first charter submitted within such year.[49] While a charter commission must be appointed for a four-year term under the statute, its meaningful existence for the purpose of submitting amendments to a charter was deemed dependent upon a charter being drafted and *accepted* by the electorate within its first year of existence; the court theorized that the statute contemplated that once a proposed charter had been framed and rejected by the electorate, another and differently constituted commission would more likely frame an acceptable charter thereafter.[50]

ZONING

The First Circuit Court of Appeal presumably wrote a final chapter to litigation over the re-zoning of land in *Villa Del Rey Citizens Association v. City of Baton Rouge*.[51] The court had previously upheld a petition for declaratory judgment as an appropriate procedure to test the legality of a re-zoning ordinance even though not coupled with the prayer for injunctive relief which would render the proceeding summary in character.[52] A companion case established the legality of the zoning action but no attack had been made on the ordinance as an unconstitutional delegation of power, devoid of sufficient guidelines and standards to insure freedom from discriminatory application.[53] On remand of the first case, this constitutional attack was made and rejected by the trial court. The court has now affirmed that the standards and guidelines contained in the ordinance are adequate to insure non-discriminatory treatment of zoning applications.[54]

Issues of both fact and law in zoning cases have traditionally been fully reviewed by the courts on appeal, probably wisely since both testimony and argument are often emotional and self-serving. In *Jemison v. City of Kenner*,[55] a re-zoning application was rejected and the decision was attacked as arbitrary and capricious. The court held that a rejection was unreasonable and therefore capricious and arbitrary where based on the self-serving wishes of some citizens but

49. *Id.* at 352-53.

50. *Id.* at 353.

51. 273 So. 2d 574 (La. App. 1st Cir. 1973).

52. Villa Del Rey Citizens Association v. City of Baton Rouge, 233 So. 2d 566 (La. App. 1st Cir. 1970).

53. Smith v. City of Baton Rouge, 233 So. 2d 569 (La. App. 1st Cir. 1970).

54. 273 So. 2d at 576.

55. 277 So. 2d 728 (La. App. 4th Cir. 1973).

in disregard of valid sound reasons to the contrary.[56]

In *Adrouny v. International City Bank & Trust Co.*,[57] a possible extension or enlargement of a non-conforming use of bank property was subjected to judicial review by adjoining property owners. Construction of drive-through TV tellers on an adjacent parking lot was held not to be an extension or enlargement of the non-conforming use of the land even though it might result in more frequent use of the parking lot. An allegation that the construction constituted a nuisance was rejected.[58]

56. *Id.* at 730.
57. 266 So. 2d 524 (La. App. 4th Cir. 1972).
58. *Id.* at 525.