Public Law: Administrative Law and Procedure

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AGENCY LAW

School Boards

Samuel Johnson, Boswell tells us, "upon all occasions, expressed his approbation of enforcing instruction by means of the rod." The good Dr. Johnson lived in the eighteenth century, yet as everybody knows the problem of discipline in our schools is still with us. Whether the rod can be used today in Louisiana's elementary schools was the question in Roy v. Continental Ins. Co., and the Third Circuit Court of Appeal in a worthy opinion by Judge Domengeaux opined the Johnsonian view. The swat, it seems, is still with us.

For the first time now in Louisiana school law a court of appeal has held that "corporal punishment, reasonable in degree, administered by a teacher to a pupil for disciplinary reasons, is permitted in Louisiana." Judge Domengeaux distinguished a number of cases in which the punishment administered was excessive. In Roy, the court felt, the punishment was reasonable—a few swats in the classic area.

In upholding the teacher's use of the paddle, the court of appeal noted that nothing in Louisiana law expressly prohibits the use of corporal punishment in the classroom. Furthermore, Louisiana Civil Code article 220 suggests that

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1. J. Boswell, Life of Samuel Johnson, LL.D. 7 (1791). Whether Johnson's reasoning makes any sense is for the reader: "I would rather (said he) have the rod to be the general terror to all, to make them learn, than tell a child, if you do thus, or thus, you will be more esteemed than your brothers or sisters. The rod produces an effect which terminates in itself. A child is afraid of being whipped, and gets his task, and there's an end on't; whereas, by exciting emulation and comparisons of superiority, you lay the foundation of lasting mischief; you make brothers and sisters hate each other." Id. I owe this reference and much else to my dear friend and esteemed correspondent at Claremont College, Jas. Viator.

2. 313 So. 2d 349 (La. App. 3d Cir. 1974).

3. Id. at 354.


1. J. BOSWELL, LIFE OF SAMUEL JOHNSON, LL.D. 7 (1791). Whether
teachers, who stand in the parents' place in the classroom, have the authority to paddle unruly students. Because a teacher has the duty of maintaining discipline and good order in the schools, the third circuit thought it necessary that he have the means, including reasonable corporal punishment, of enforcing prompt discipline. In the court's view, to hold otherwise would "encourage students to flaunt the authority of their teachers, and effectively shackle the teaching profession at a time of rising disciplinary problems in the schools."  

Clearly, as far as the need for discipline in the schools is concerned, the Third Circuit Court of Appeal agrees with Hugo Black, who said in Tinker v. Des Moines School District that "sometimes the old and the tried and true are worth holding," including rigorous discipline of students in the classroom. But when there are two views, it would seem best to leave arguments about the appropriateness of different forms of student discipline to the school officials themselves, and not to the judges. The court's opinion in the Roy case is consistent with the idea of limited judicial review of the policy determinations of school boards, an idea acknowledged in the cases.  

Whether the United States Constitution prohibits or limits the use of corporal punishment in the schools remains to be seen. The issue has not been settled yet, although some cases in the reports suggest that the Federal Constitution does not require sparing the rod.

5. "Fathers and mothers may, during their life, delegate a part of their authority to teachers, schoolmasters and others to whom they intrust their children for their education, such as the power of reasonable restraint and correction, so far as may be necessary to answer the purposes for which they employ them." LA. CIV. CODE art. 220.  
9. In its opinion in Roy the third circuit cited Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974), the leading federal case, for the proposition that the federal courts have consistently held that corporal punishment, reasonably imposed, is not violative of constitutional rights, including due process, equal protection, and the prohibition against cruel and unusual punishment. However, the Fifth Circuit has granted a rehearing en banc in the Ingraham case, 504 F.2d 1379 (1974), and there is no final judgment on the merits of the case to date.
A large number of cases decided during the 1974-1975 term concern the Teachers' Tenure Law;\(^\text{10}\) these cases involve teachers who had lost either their jobs, their pay, or their position. The tight economy apparently precipitated most of these cases, and it is evident from the reports that the judges' job interpreting tenure laws is especially delicate in hard times.

_Boddie v. Jackson Parish School Board\(^\text{11}\) turned on an easy idea: unless a teacher is hired on in the first place, she has no rights under the tenure laws. In _Boddie_ the school board rejected plaintiff's application for employment, but she sued the board anyway, claiming de facto employment. The second circuit affirmed dismissal of her suit. "In order for plaintiff to be entitled to the protection of the Teachers' Tenure Law," said the court, "plaintiff must be an employee of the school system with the status of probationary teacher."\(^\text{12}\) On the evidence presented the court ruled plaintiff was never employed and she did not acquire tenure status. Moreover, without the written contract required by law,\(^\text{13}\) plaintiff was in no position to complain.\(^\text{14}\) The court did acknowledge, however, that a case of de facto employment according tenure status might arise under extenuating circumstances, not present in _Boddie_.\(^\text{15}\)

_Castille v. Evangeline Parish School Board\(^\text{16}\) involves a significant improvement in the jurisprudence. Unlike the first circuit's opinion last term in _Serignet v. Livingston Parish School Board_,\(^\text{17}\) an opinion that obliterated "the hard line which the law has always drawn between probationary teachers and those with tenure,"\(^\text{18}\) the third circuit has flatly held:

\(^{10}\) _La._ R.S. 17:441-45 (1950).
\(^{11}\) 312 So. 2d 681 (La. App. 2d Cir. 1975).
\(^{12}\) _Id._ at 683.
\(^{13}\) _See_ _La._ R.S. 17:413 (1950) which sets forth "prerequisites for employment" and provides in part that "No person shall be appointed to teach without a written contract for the scholastic year in which the teaching is to be done."
\(^{14}\) _Accord, State ex rel. Golson v. Winn Parish School Bd., 9 So. 2d 342 (La. App. 2d Cir. 1942); Lanier v. Catahoula Parish School Bd., 154 So. 469 (La. App. 2d Cir. 1934)._
\(^{15}\) 312 So. 2d at 685.
\(^{16}\) 304 So. 2d 701 (La. App. 3d Cir. 1974).
\(^{17}\) 282 So. 2d 761 (La. App. 1st Cir. 1973).
There is no requirement in R.S. 17:422 for notice to a probationary teacher of the superintendent's reasons for recommending dismissal. Nor is there a requirement that such a teacher be given a hearing or an opportunity to rebut the charges. Hence, none were necessary.  

It remains now for the Louisiana Supreme Court to decide which interpretation of Louisiana R.S. 17:422 is correct.  

Once tenure attaches, as it had in McGraw v. Iberia Parish School Board, the results are quite different. Without notice or hearing and without a whisper of justification, John McGraw was terminated as an assistant superintendent, his pay was cut, and he was bumped to a lower status. He refused his new position and instead sued his school board under the tenure laws. He won. And it is reassuring that the same court that rebuffed Castille's case could so firmly decide in favor of John McGraw. The difference, of course, is that between the probationary side of the line and the tenured side, and with this latest tenure case, the third circuit has redrawn the hard line.  

Mouras v. Jefferson Parish School Board sustains a school board's reduction of the local salary supplement of public school principals and assistant principals. The reduction applied to entire categories of tenured personnel, not just to one teacher's pay, and therefore was not a disciplining, removal, or demotion prohibited by the tenure laws. The principals and assistants, unlike regular classroom teachers, had received extra paychecks in previous years, so for the school board, in a tight fiscal year, to reverse its policy of extra paychecks to this one group alone was not unfairly discriminatory. Since the classification was not arbitrary for

19. 304 So. 2d at 703.
20. Although the third circuit did not reach the issue in Castille v. Evangeline Parish School Bd., 304 So. 2d 701 (La. App. 3d Cir. 1974), there would seem to be no constitutional requirement of notice and an opportunity to be heard before discharge of a non-tenured, probationary teacher. At least this is the latest ruling of the United States Fifth Circuit Court of Appeals in LaBorde v. Franklin Parish School Bd., 510 F.2d 590 (5th Cir. 1975).
21. 310 So. 2d 139 (La. App. 3d Cir. 1975).
23. Thus the third circuit has eliminated the confusion which used to exist in that circuit regarding the distinct procedures applicable to probationary and to tenured teachers. Compare its latest holding with Fleming v. Concordia Parish School Bd., 275 So. 2d 795 (La. App. 3d Cir. 1973).
24. 300 So. 2d 540 (La. App. 4th Cir. 1974).
purposes of increasing one class's pay, it was not arbitrary for purposes of decreasing that class's pay. Judge Redmann, writing for the fourth circuit, acknowledged that some people might disagree with the school board on what the salaries of principals should be; some might think it wise to take other economies in order to raise principals' pay. Nonetheless the court responded:

But these are not judicial questions. We have not been elected to the legislature; we have not been elected to the school board. Our function is not to apportion funds, but to decide each case under the law, and to order whatever remedy the law provides.

To effect a proper dismissal of a probationary teacher, both the school superintendent and the school board must comply literally with the terms of the applicable statute, Louisiana R.S. 17:422, and Louisiana courts have invariably insisted on procedural regularity under the tenure laws, sometimes at very high costs to the affected school board. In Palone v. Jefferson Parish School Board the Louisiana Supreme Court ordered the reinstatement of four assistant principals whose positions had been abolished by the school board as an economy measure. There was no evidence in the case that the school board acted in bad faith; it was suffering a substantial deficit and adopted a resolution abolishing the position of second assistant principal in order to reduce expenditures. But section 4429 says that the school board may take action only upon the written recommendation of the superintendent of schools, accompanied by valid reasons. Here the superintendent had made no recommendation to the board concerning its resolution. The court was unimpressed

25. Id.
26. Id. at 542. Judge Redmann's opinion in the Mouras case is typical of his superb style. He is usually quite to the point—like Holmes was. Holmes' Buck v. Bell opinion, 274 U.S. 200 (1927), comes immediately to mind. Holmes' opinions were short and pungent, and so are Judge Redmann's. For more on this style point, see PUSEY, CHARLES EVANS HUGHES 285-86 (1951).
with the rationale that a written recommendation was not required, because the school board's action affected an entire group of school personnel. "The Teachers' Tenure Act . . . applies whether the action taken affects only one teacher or several teachers." Accordingly, the court ordered plaintiffs reinstated in their positions as assistant principals, presumably with back pay.

The result in the Palone case seems an especially harsh one. In effect the court's judgment requires the school board to fund four positions (at least during the course of the litigation and until proper termination procedures) for which no monies were available in the first place. It would seem that the Teachers' Tenure Law was not meant to guarantee job security when there are no jobs. The court is quite right on the procedural point in the case: the superintendent made no recommendation himself to abolish the second assistant principal category. But the circumstances in the Palone case were extraordinary, and the court in its opinion gives too little weight to the financial crisis confronting the school board.

The First Circuit Court of Appeal's opinion in McCoy v. Tangipahoa School Board, also ordering reinstatement of a tenured school principal, closely tracks the reasoning of the Palone case. McCoy holds that failure of a school board to comply with Louisiana R.S. 17:442-43 regarding proper termination procedures is not excused by the fact that a federal court desegregation order had closed plaintiff's school, leaving him without a job. These integration orders, according to an established line of cases, may not adversely affect tenured school teachers, who are entitled to transfer to some other position of equal dignity and pay.

One statement in the McCoy opinion is questionable, although it reflects the supreme court's view. The court of appeal said that if no comparable position was available to McCoy, he was nevertheless entitled to continuance of pay for the position of principal. Again this results in guaranteeing

31. 308 So. 2d 382 (La. App. 1st Cir. 1975).
32. Id. at 386-87.
job security to a teacher when there is no job, and it is
doubtful that the tenure laws were meant to extend protec-
tion this far, at least in ordinary circumstances. If economic
necessity, rather than a federal court integration order,
forced the closing of a school, one would not expect the
school's faculty to have rights to continued employment at
the same pay elsewhere.

_Louisiana Teachers' Ass'n v. Orleans Parish School
Board_ is a brave opinion with far-reaching consequences for
public employee collective bargaining in this state. The fourth
circuit, with Judge Lemmon writing a carefully reasoned
opinion for the majority, has held that a school board, inci-
dental to its statutory authority to hire teachers and fix their
salaries, may bargain collectively with an agent selected by
the school teachers, if the board in its discretion thinks im-
plementation of collective bargaining will more efficiently ac-
complish its employment objectives. The court reasoned that
Louisiana's public policy favors self-organization by em-
ployees in the private sector. No law expressly prohibits
a school board or other public agency from recognizing a
collective bargaining agent. And the court's majority could
see no reason founded on public policy why collective bargain-
ing should not be allowed in the public sector "when the
public employer in its discretion has willingly decided to
utilize this method of conducting its labor relations." Since
the Orleans Parish School Board in its wisdom favored recog-
nition of a bargaining agent for its teachers, the court spe-
cifically declined to examine the merits of the Board's action
as not within the judicial function.

_Milk Commission_

Members of the Louisiana Milk Commission successfully
fended off the State Ethics Commission this term in an attack
(La. App. 1st Cir. 1973); _State ex rel. Parker v. Vernon Parish School Bd._, 225
La. 297, 72 So. 2d 512 (1954).

35. 303 So. 2d 564 (La. App. 4th Cir. 1974).
38. 303 So. 2d at 567-68.
39. Judge Samuel dissented in the case. According to him, by recognizing
a bargaining agent the board would unlawfully surrender some of its
decision-making authority. In addition, because of the magnitude and com-
plexity of the step taken by the board "the matter appears to be one which
addresses itself to express legislative action." _Id._ at 570.
based upon alleged conflict of interest among Milk Commission members. By statute, three members of the Milk Commission must be milk processors and one member must be a milk producer. To the Ethics Commission, these qualifications necessarily involved the Milk Commission in conflict of interest, since at least four of its members served while owning an economic interest in the dairy industry. The Ethics Commission issued an opinion holding that Louisiana R.S. 42:1111(H) prohibits membership on the Milk Commission by persons who are producers, handlers, retailers, or otherwise engaged in the dairy industry. But the First Circuit Court of Appeal reversed the Ethics Commission, holding that the commission acted ultra vires when it condemned the membership of the Milk Commission for an alleged conflict of interest. Nowhere in the act creating the Ethics Commission, the court held, is the Ethics Commission authorized to change the qualifications of members of the Milk Commission, and the legislature's statutory requirement of industry representation on the Milk Commission is final.

Civil Service

The scope of the remedy for wrongful discharge of classified fire fighters was before the Louisiana Supreme Court this term in Hebbler v. New Orleans Fire Department. The narrow question in the case was whether the New Orleans Fire Department, the agency which had wrongfully discharged Hebbler, was liable to him for state supplemental pay as well as for city base pay. Under Louisiana R.S. 49:113 an employing agency must reimburse a wrongfully discharged employee for "all salaries and wages withheld during the period of illegal separation." Hebbler argued that "all salaries and wages withheld" includes state supplemental pay for firemen. The supreme court agreed. The statute, the court ruled, makes no distinction as to the source of the salaries and wages of an illegally discharged employee. Moreover, Hebbler's state supplemental pay was lost directly as a result of his illegal discharge by the New Orleans Fire Department; accordingly, he was entitled to be reimbursed for his entire

40. See also L.A. R.S. 40:940.16 (1965).
41. Louisiana Milk Comm'n v. Louisiana Comm'n on Gov'tal Ethics, 298 So. 2d 285 (La. App. 1st Cir. 1974).
42. 310 So. 2d 113 (La. 1975), reversing Hebbler v. New Orleans Fire Dep't, 299 So. 2d 825 (La. App. 4th Cir. 1974).
loss, including lost supplemental pay, by his employing agency.

Clearly the supreme court is right in *Hebbler* to say that the legislative intent is to make a reinstated employee whole for his loss during the period of illegal separation from employment. The court's new rule facilitates that end, and is thus a worthy development in the law of remedies for wrongful discharge in civil service cases.

*Flores v. State Department of Civil Service*43 settles an important question for the civil service practitioner; it holds that judicial review of civil service commission rulings lies only in the appropriate court of appeal and not in the district courts. Judicial review in civil service cases is thus in the nature of an appeal and not trial de novo.44 The First Circuit Court of Appeal rejected the argument that the general judicial review provision of the Louisiana Administrative Procedure Act45 authorizes review in the district court, and the supreme court denied writs, pointing out that the Louisiana constitution expressly provides that appeals from civil service commissions are to be taken exclusively to the appellate courts.46

In at least three cases decided during the term the courts of appeal reversed civil service commission rulings, ordering either that the aggrieved employee be reinstated or that the commission hold a new hearing on the matter. *Biggio v. Department of Safety & Permits*47 is especially important for civil service administration. It bluntly rejects the view that a classified employee can be dismissed from the civil service on the theory that he is not the "best man" for the job. This theory, the court of appeal held, is arbitrary on its face and undermines the protection accorded civil service personnel by the state constitution. The court reasoned that no classified employee would be safe in his job if the appointing authority were allowed to replace him on such intangibles as leadership, imagination, and innovativeness. Furthermore:

It is easy to see the chaotic condition which would result if the Appointing Authority were permitted to search out...
and seek the "best man" for every classified position. The will of the people in passing a constitutionally guaranteed system of Civil Service would thus be ignored and the job protection offered by the system would cease to exist.\textsuperscript{48}

The court is probably right in Biggio to repudiate, in the name of the people, the best man theory for Louisiana's civil service administration; the risks of abuse under that system are apparent, and the constitution would seem to preclude the practice anyway.

\textit{Bennett v. Division of Administration}\textsuperscript{49} rightly holds that serious misconduct justifies dismissal from the civil service, notwithstanding its occurrence before employment begins. To rule otherwise would confer an unwarranted immunity for civil service employees that would seriously limit review of their fitness to hold civil service employment.

\textit{Golphin v. Division of Administration}\textsuperscript{50} reverses an order of the Civil Service Commission on procedural grounds. In this case the commission erred, the court said, when it refused to hear evidence offered by the civil service employee to show he was discriminated against by his immediate supervisor. The Louisiana Constitution of 1921 required that a civil servant who is fired be given a chance to show bias on the part of the appointing authority as the real reason for his discharge,\textsuperscript{51} notwithstanding express charges indicating another cause for the discharge. The court's ruling in \textit{Golphin} seems correct in light of the earlier jurisprudence.\textsuperscript{52}

Under Louisiana law the Civil Service Commission may modify the penalty imposed by an appointing authority if the commission thinks a modification is warranted.\textsuperscript{53} In \textit{Pendley v. Louisiana Division of Administration}\textsuperscript{54} the First Circuit Court of Appeal reversed the commission because the commission failed to consider whether a modification of the penalty that was imposed in the case was in order. However, the commission did its job under the law, including the review of

\begin{itemize}
\item \textsuperscript{48} \textit{Id.} at 512.
\item \textsuperscript{49} 307 So. 2d 118 (La. App. 1st Cir. 1974).
\item \textsuperscript{50} 314 So. 2d 498 (La. App. 1st Cir. 1975).
\item \textsuperscript{51} La. Const. art. XIV, § 15(A)(1) (1921).
\item \textsuperscript{52} King v. Dep't of Public Safety, 234 La. 409, 100 So. 2d 217 (1958); Cormier v. State Dep't of Institutions, 212 So. 2d 143 (La. App. 1st Cir. 1968).
\item \textsuperscript{53} See Dickson v. Richardson, 236 La. 668, 109 So. 2d 51 (1959); Brickman v. Orleans Aviation Bd., 236 La. 143, 107 So. 2d 422 (1958).
\item \textsuperscript{54} 303 So. 2d 544 (La. App. 1st Cir. 1974).
\end{itemize}
the penalty, and the first circuit's review of the commission's work in the case seems unduly strained; the court should have affirmed.

Department of Public Safety

The first circuit has decided that the provisions of the Louisiana Administrative Procedure Act apply to the Department of Public Safety, including the rule that an order of the Department suspending a driver's license is subject to rehearing within ten days from the date of the order's entry. Other cases during the term in this category of agency law presented constitutional challenges to the Louisiana Implied Consent Law, but the courts of appeal continued to reject these attacks. Under Louisiana law a driver does not enjoy the right to Miranda warnings, or to the presence of counsel, before deciding whether to submit to the chemical test prescribed by the statute; and these tests themselves,

55. In denying Pendley's appeal, the civil service commission said: "The Commission cannot, as appellant contends, properly substitute its judgment for that of the appointing authority unless . . . it believes that the punishment inflicted for the conduct complained of is so flagrantly out of balance that the disciplinary action should be reduced. In the case before us there is sufficient cause for discipline and the severity of the discipline is not disproportionate to the conduct which provoked it." 303 So. 2d at 547-48. This excerpt from the commission's opinion in the case suggests that the commission was fully aware of its powers to modify the penalty but believed modification inappropriate in Pendley's case.

56. Young v. State Dep't of Public Safety, 298 So. 2d 298 (La. App. 1st Cir. 1974).

57. See Green v. Dep't of Public Safety, 308 So. 2d 863 (La. App. 4th Cir. 1975); Harrison v. State Dep't of Public Safety, 298 So. 2d 312 (La. App. 4th Cir.), cert. denied, 300 So. 2d 840 (La. 1974).

58. The relevant jurisprudence was nicely summarized in one case this term, Swan v. Dept' of Public Safety, 311 So. 2d 498, 500 (La. App. 4th Cir. 1975).

59. In one case decided during the 1974-1975 term a disgruntled driver whose license was revoked sued the Public Safety Department claiming that its chemical test was invalid in two respects. First, the driver claimed that the test had not been approved by the Department of Health; and, secondly, he claimed that, to be valid, the photoelectric intoximeter test which is administered should consist of two parts, and not just one. The supreme court rejected both these claims, however. There was no evidence in the record to show that the test offered in the case was invalid, either legally or scientifically. And the court noted: "The fact that this is an action for judicial review of an administrative hearing does not change the burden of proof placed by law on the plaintiff." Meyer v. State Dep't of Public Safety License Control & Driver Improvement Division, 312 So. 2d 289, 292 (La. 1975).
under the law, do not violate the right against self-incrimination.

In two cases decided during the term, however, the court of appeal reversed the Department of Public Safety for procedural flaws in suspending drivers' licenses. *Green v. Department of Public Safety* reverses the Department because it did not afford the driver an opportunity for the administrative hearing required by statute. *Neely v. Department of Public Safety* reverses because the police officer's report in the case was not a sworn report, also required by the provisions of Louisiana R.S. 32:662. Another case, *Hendrix v. Department of Public Safety*, holds that the words "shall suspend" in Louisiana R.S. 32:667 are mandatory, not permissive, and that a district court has no jurisdiction to limit the Department's suspension of a driver's license in hardship cases.

**Department of Employment Security**

In *National Gypsum Company v. Administrator, Louisiana Department of Employment Security*, the Louisiana Supreme Court, reversing the fourth circuit, has held that unemployment due to a lockout by the employer is not caused by "a labor dispute which is in active progress," within the meaning of Louisiana R.S. 23:1601(4), and hence employees who are locked out by their employer during contract negotiations can collect unemployment compensation. Justice Tate's majority opinion distinguishes *Senegal v. Lake Charles Stevedores, Inc.*, in which the court held that striking employees are not entitled to unemployment benefits. During a strike employees voluntarily leave their jobs, whereas during a lockout they are forced out of the plant by the employer. Since the state's position with respect to labor-management relations during contract negotiations is supposed to be strictly neutral, to deny unemployment benefits to employees who are locked out would, in the majority's view, "add a sanction not contemplated by law to conduct by the employer designed to withhold subsistence from his workers and their

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60. 308 So. 2d 863 (La. App. 4th Cir. 1975).
61. 308 So. 2d 881 (La. App. 2d Cir. 1975).
62. 311 So. 2d 547 (La. App. 3d Cir. 1975).
63. 313 So. 2d 230 (La. 1975).
65. 250 La. 623, 197 So. 2d 648 (1967).
families in order to force them to accept the employer's terms.\textsuperscript{66} The majority also reasoned that denying unemployment compensation in circumstances of a lockout would encourage the employer to resort to this aggressive measure, in derogation of peaceful negotiations at the bargaining table.\textsuperscript{67}

Chief Justice Sanders dissented in the case\textsuperscript{68} in an opinion joined by Justices Summers and Barham. In their view the majority opinion in \textit{National Gypsum} upsets the state's position of neutrality in labor disputes by undermining the effectiveness of the lockout as an economic weapon available to the employer during a labor dispute.\textsuperscript{69}

Where one comes out in the \textit{National Gypsum} case depends on one's point of view and on an assessment of the consequences of ruling one way or the other in the case. The statute itself is hardly clear on the matter. For the writer, the majority's position makes good sense because it keeps the parties at the bargaining table during contract negotiations and it tends to keep the plant open too. This is as it should be in an enlightened era of labor-management relationships.

\textit{Commissioner of Insurance}

\textit{Employers-Commercial Union Insurance Co. v. Bernard}\textsuperscript{70} is an important case affecting the authority of the Commissioner of Insurance to regulate insurance premium rates in the state. The First Circuit Court of Appeal held that regulation of premium rates is exclusively the business of the Louisiana Insurance Rating Commission,\textsuperscript{71} but the supreme court reversed, holding that the Commissioner of Insurance has the authority to investigate premium rates, hold hearings, and prohibit charging excessive rates under the provisions of Louisiana R.S. 22:1214-17. The court rejected the

\begin{itemize}
  \item \textsuperscript{66} 313 So. 2d at 233.
  \item \textsuperscript{67}  Id. at 234.
  \item \textsuperscript{68}  Id. at 234 (Sanders, C.J., dissenting).
  \item \textsuperscript{69}  Id. at 235.
  \item \textsuperscript{70} 303 So. 2d 728 (La. 1974). Chief Justice Sanders and Justice Barham dissented. They were of the view that the receipt of premiums fixed in conformity to the Louisiana Insurance Code is not an unfair method of competition or a deceptive trade practice, and hence the Insurance Commissioner has no authority to disapprove of these rates.
  \item \textsuperscript{71}  \textit{Employers-Commercial Union Ins. Co. v. Bernard}, 286 So. 2d 445 (La. App. 1st Cir. 1973).
\end{itemize}
argument that rates legally filed and not disapproved by the Rating Commission are immune from examination by the Commissioner of Insurance: "This is not the scheme of the act. Rate filings may be disapproved or found ineffective at any time."\textsuperscript{72} The case is a significant victory for the Insurance Commissioner, confirming the broad power of his office over a matter vitally affecting the citizens of Louisiana.

\section*{Administrative Procedure Generally}

\textit{Delegation Doctrine}

Occasionally in administrative adjudication a respondent argues that the legislature has unlawfully delegated legislative power to the agency in question and that, as a consequence, he is free from agency regulation. This argument springs from the idea of separation of powers: the legislature must do the legislating, not the agency, and so statutes setting up an agency must, it is said, "establish a sufficient basic standard and rule of action for the guidance of the instrumentality or officer that is to administer the law."\textsuperscript{73} Otherwise the agency is free, in its discretion, to fashion primary policy, a result that is inconsistent with the idea of separation of powers. About twenty years ago in Louisiana, the doctrine of unlawful delegation of legislative power was quite popular, both with counsel who argued the point and with judges who sustained it. In those days the Louisiana Supreme Court regularly struck down the legislature's use of the administrative process to solve the many new problems of our emerging modern technology.\textsuperscript{74} Today, however, the cases allow far more room for the legislature to delegate regulatory responsibility to administrative agencies, and this term's \textit{Johnson v. Pearce},\textsuperscript{75} involving the State Livestock Sanitary Board, is an indication of the new mood.

\begin{thebibliography}{9}
\bibitem{72} 303 So. 2d at 733.
\bibitem{73} City of Alexandria v. Alexandria Fire Fighters Ass'n, 220 La. 754, 57 So. 2d 673 (1952).
\bibitem{74} Tichenor Antiseptic Co. v. Schwegmann Bros. Giant Super Mkts, 231 La. 51, 90 So. 2d 343 (1956) is the leading case. Accord, Ezell v. City-Parish Plumbing Bd. of Baton Rouge, 234 La. 441, 100 So. 2d 464 (1958); State v. Morrow, 231 La. 572, 92 So. 2d 70 (1956).
\bibitem{75} 313 So. 2d 812 (La. 1975). But Justice Summers' point, in his dissent, that the Board under the challenged act has too much discretion to decide whether and when to quarantine has some merit. There is indeed a potential
Under Louisiana R.S. 3:2223 the Livestock Sanitary Board has the authority to "promulgate necessary rules and regulations" to effectuate the state's policy of eradication of brucellosis; the statute inaugurates a program to prevent reinfection of livestock with brucellosis. Respondent, whose cattle were under investigation by the Board, claimed that the statute unconstitutionally delegated legislative power to the administrative agency. The supreme court disagreed, with only Justice Summers dissenting. The court noted that section 2223 is similar to federal regulations on the same subject which have been sustained against the complaint of unlawful delegation. What the Louisiana statute delegates is not the responsibility of fixing primary policy—the statute itself fixes that; it delegates only the power "to supply the details for furthering that legislative policy through the use of veterinary science in a time when that science is changing and progressing too rapidly for the legislature to adopt any detailed long-range program." The court concluded that there is no unlawful delegation of legislative power in sections 2221 and 2223.

Thus the Louisiana jurisprudence on the delegation doctrine now reflects the federal administrative pattern that the legislature, so long as it sets the primary standard, may leave to the administrative agency the "power to fill up the details" of the administrative scheme. The supreme court did say in the Johnson case, however, that if the agency adopts rules and

for abuse of what amounts to prosecutorial power under the act. But this problem is not new to administrative procedure. See K. DAVIS, DISCRETIONARY JUSTICE 1, passim (1969). Just what to do about controlling prosecutorial discretion has never been determined, however. At least Justice Summers deserves credit for broaching the subject in his dissent.

The subject of alleged abuse of the Livestock Sanitary Board's quarantine power arose in another case decided during the term. In Louisiana Livestock Sanitary Bd. v. Prather, 301 So. 2d 688 (La. App. 3d Cir. 1974), the court noted: "We do not feel that the plaintiff should be precluded forever from enforcing its regulations due to the fact that it has not aggressively enforced them in the past or because it has failed to enforce them as to other violators." 301 So. 2d at 691. However, the court did not explain its statement, and the equal protection issue is by no means that easy.

76. Id. at 815.
77. Id. at 819.
78. In United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932), the United States Supreme Court articulated the federal pattern as follows: "But Congress may declare its will, and, after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."
regulations exceeding the limitations of the enabling legislation's purpose, or if it takes action inconsistent with the state's declared policy, redress may be had in the courts on judicial review.\textsuperscript{79}

**Standing To Sue**

The law on standing to sue has gradually eased more and more plaintiffs into court to challenge agency action; it is enough today that plaintiff has suffered an injury in fact, including competitive injury in fact. The leading federal cases to this effect are *Association of Data Processing Service Organizations v. Camp\textsuperscript{80}* and *Barlow v. Collins.*\textsuperscript{81} Both were cited this term in Justice Tate's opinion for the court in *Louisiana Independent Auto Dealers Ass'n v. State,*\textsuperscript{82} and Louisiana's law on standing to sue now reflects the federal injury in fact idea.

**Exhaustion of Administrative Remedies**

Ordinarily, before an aggrieved party can seek judicial review in Louisiana, as elsewhere, he must first exhaust available administrative remedies. But there are exceptions to the requirement of exhaustion, including the idea that when an agency is proceeding unlawfully, its process need not be exhausted by an aggrieved party. In *Louisiana Milk Commission v. Louisiana Commission on Government Ethics*\textsuperscript{83} the court of appeal held that the State Ethics Commission has no jurisdiction to order the removal of several members of the Milk Commission for alleged conflict of interest based on the fact that these members represent the milk industry on the Commission. The law requires these members to have an economic interest in the milk industry in Louisiana,\textsuperscript{84} and, consequently, the State Ethics Commission has no authority to rule that such representation violates the State Ethics Code.\textsuperscript{85} Moreover, the members of the Milk Commission who were threatened with removal from office did not have to submit to the Ethics Commission's administrative process be-

\textsuperscript{79} 313 So. 2d at 819.
\textsuperscript{80} 397 U.S. 150 (1970).
\textsuperscript{81} 397 U.S. 159 (1970).
\textsuperscript{82} 295 So. 2d 796 (La. 1974).
\textsuperscript{83} 298 So. 2d 285 (La. App. 1st Cir. 1974).
\textsuperscript{84} See LA. R.S. 40:940.16 (1965).
\textsuperscript{85} LA. R.S. 42:1101 (1965).
fore seeking judicial review, because that agency was proceeding unlawfully in the first place.

**Agency Investigatory Powers**

It would make little sense to authorize an administrative agency to enforce a particular regulatory scheme but deny the agency the necessary investigatory powers to do its job under the act. Fortunately, in *Warren v. State Department of Labor*, the first circuit rejected the claim that the Commissioner of Labor has no subpoena power to investigate possible violations of Louisiana R.S. 23:898, which prohibits transportation of strikebreakers into Louisiana. Louisiana R.S. 23:11 sets out the Commissioner's power regarding compulsory process, and under that provision the Commissioner of Labor can issue subpoenas to compel the attendance of witnesses and the production of documents as in civil proceedings. The court of appeal also rejected the argument that allowing the Commissioner of Labor to investigate possible violations of a statute carrying a criminal penalty usurps the power of the district attorney. That is not true, the court ruled, because an investigation by the Labor Commissioner in no way hinders the district attorney's office's own investigation. Moreover, the Department of Labor may legitimately conduct investigations for many purposes other than development of evidence for the enforcement of the criminal law, and nothing in the record suggested to the court that the Commissioner of Labor was motivated solely by the purpose of developing a criminal case.

The first circuit's conclusions in the *Warren* case seem sensible enough to the writer. Front-line responsibility for investigating labor problems in Louisiana should be left to the Commissioner of Labor, who is intimately familiar with this state's labor laws and who, it would seem, has primary, but not exclusive, jurisdiction in the matter.

**Public Records Law**

It seems the public's "right to know" is in the air lately, and the 1974-75 term produced a ruling from the first circuit

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86. 313 So. 2d 6 (La. App. 1st Cir. 1975).
87. Id. at 11.
88. For a discussion of the idea of primary jurisdiction, see K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 19.01 (3d ed. 1972).
in favor of broad disclosure of governmental information under the Louisiana Public Records Law. Bartels v. Roussel holds that departmental budget requests of the Baton Rouge City Parish government are subject to public disclosure under Louisiana R.S. 44:1, notwithstanding the City-Parish's argument that these requests were only tentative since they had not yet been acted upon by the city's mayor-president. The court ruled that the requests were, in the words of the statute, "being in use" and, as a result, they were subject to discovery under Louisiana R.S. 44:32, a provision guaranteeing the right of the public to examine public documents and requiring their custodian to allow access to them. The first circuit stated that "the right of the public to be adequately informed is of fundamental importance," and it thought it imperative that the Public Records Law be liberally construed so as to extend rather than restrict access to public records. The first circuit's ruling extending disclosure in the Bartels case is consistent with what appears to be the Louisiana Supreme Court's attitude in favor of broad public access to governmental information and decision-making.

91. 303 So. 2d at 838.