South Carolina Law Review

Volume 19
Issue 4 *Survey of South Carolina Law 1967*

Article 1

1967

Administrative Law

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ADMINISTRATIVE LAW

I. Judicial Control of Agencies

Lee County School District Number 1 v. Gardner,[1] the most interesting case to arise in the administrative law field, concerned school desegregation. The legal issues were judicial control over a governmental agency and the accompanying question of sovereign immunity. Since the case was decided on a motion to dismiss, its merits were never reached. The question was whether the United States Commissioner of Education had the right to defer payment of federal funds to the plaintiff school district without a hearing. The court denied the defendant's dismissal motion, but at the same time delayed giving a ruling by directing the parties to proceed through channels to a final administrative decision and then to reappear before the court. In this way the district court preserved its jurisdiction while allowing for the exhaustion of administrative remedies.

Title IV of the 1964 Civil Rights Act[2] empowers the Commissioner of Education to withhold federal funds from schools that practice racial discrimination. To continue receiving these grants, schools must meet certain desegregation plans or guidelines. The plaintiff's attempts to comply were deemed insufficient by the Commissioner who "deferred" the funds. The school district promptly brought this action to enjoin the deferral. The defendant moved for dismissal on two grounds: First, that the doctrine of sovereign immunity prevented the suit against the government, and second, that the court could not properly take jurisdiction before the administrative process was complete.

Because many administrative law cases involve suits against government agencies, sovereign immunity is an often raised defense. This doctrine is not a defense to a complaint that alleges that the government's agent acted outside the scope of his authority. The theory is that the agent is no longer acting for the government and a suit against him is against him individually.[3] Since the complaint did allege ultra vires activity, the court easily rejected this part of Commissioner's defense. A more subtle point was reached when the defendant attempted to show an analogy between this case and the landmark United States Supreme Court cases of *Larsen v. Domestic and Foreign Commerce*

1. 263 F. Supp. 26 (D.S.C. 1967).
2. 42 U.S.C. § 2000(d)2 (1964).
3. *See, e.g., Ex parte* Young, 209 U.S. 123 (1908).

Corp.[4] and *Land v. Dollar*.[5] These cases held that a suit to obtain government property was a suit against the sovereign.

The district court reasoned that the school district was not suing to obtain funds, but to enjoin an illegal withholding. The court said, "Rather than demanding positive official action on the part of defendants, this complaint only requests that the defendants be ordered to cease an allegedly unlawful interference with the flow of funds to which the plaintiffs are already otherwise legally entitled."[6] Perhaps this was a way of saying that a history of receiving and relying on the grants gave the school district an expectation right. A suit to have these funds continued was not the same as a suit to have the grants initiated.

The Commissioner's second defense was that administrative remedies had not been exhausted. When the suit was brought, the administrative process was at a standstill. The Commissioner had clogged the machinery by deferring the funds without a hearing. The right to a hearing is dictated by the Civil Rights Act.[7] The plain meaning of the statute requires that an opportunity for a hearing be provided before funds are cut off. The time specified for a hearing usually depends on the effect of the pending administrative action.[8] In this case, as the court pointed out, cutting off the funds would seriously cripple the school system. The court found it ironic that the Commissioner used exhaustion of administrative remedies as a defense when in reality it was he who was delaying the process by his inaction.

The case shows a court's ability to crank stalled administrative machinery. Pragmatically, it assured the plaintiff of reaching its overdue hearing.

A recent United States Supreme Court case should also be mentioned. The Court in *See v. City of Seattle*[9] held that administrative entry of a non-public business was illegal without a search warrant. This brought a significant change to the existing

4. 337 U.S. 682 (1949).

5. 330 U.S. 731 (1947).

6. Lee County School Dist. Number 1 v. Gardner, 263 F. Supp. 26 (D.S.C. 1967).

7. 1962 Civil Rights Act, 42 U.S.C. § 2000(d)1 (1964). The Act gives the Commissioner a means of effectuating compliance: "(1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, *after opportunity for hearing*, of a failure to comply with such requirement. . . ." (emphasis added).

8. K. DAVIS, ADMINISTRATIVE LAW TEXT § 8.08, at 154 (1959).

9. 87 S. Ct. 1737 (1967).

administrative search and seizure law.[10] The well known *Frank v. Maryland* case had held such a search to be constitutional "[w]henever the authorities shall have cause to suspect that a nuisance exists in any house. . . ."[11] In *See* the Court continued to apply its standard test of "reasonableness," but it has now imposed new restrictions in deciding what searches will be considered reasonable. The four member minority of the Court strongly objected to overruling *Frank*. They called the majority opinion a prostitution of the fourth amendment.

II. ADMINISTRATIVE CONVENIENCE

Drew v. Lawrimore[12] was a federal case interpreting a federal statute, but has been included in the survey because the decision affects South Carolina farmers. In *Drew* the district court remanded a decision of the Marketing Quota Review Committee. The committee is a federal adjudicatory body set up by the Agricultural Adjustment Act.[13] It hears grievances that a farmer might have about his market quota. The court's basic disagreement with the committee was that it had used improper standards in determining the plaintiff's quota. The committee had refused to consider the economic use of Drew's land.

The plaintiff was a Marion County tobacco farmer. His tobacco quota depended on the administrative area or "community" in which his land was classified. His farm was placed in the Marion community. This made his maximum tobacco allotment about 10,000 pounds less than if it had been classified in either of two nearby communities. An expert testified that Drew's land was composed of excellent tobacco growing soil. The plaintiff contended that this was good reason to have his farm placed in one of the other communities. The reviewing committee kept plaintiff's land in the Marion community and refused to consider the quality of the soil.

Marketing allotments are made under the Agricultural Adjustment Act.[14] The defendants stated that it had never been their policy to consider soil analysis or the economic use of the land in fixing the community boundaries. They attempted to use this past administrative interpretation to support their classification

10. *See,* Frank v. Maryland, 359 U.S. 360 (1959).
11. *Id.* at 367.
12. 257 F. Supp. 659 (D.S.C. 1966).
13. Agricultural Adjustment Act, 7 U.S.C.A. § 1363 (1938).
14. *Id.* § 1281.

standards. However, the district court agreed with Drew that the quality of the land must be considered. The court stated that the basic authority for market quota allotments stemmed from the Soil Conservation and Domestic Allotment Act.[15] The policy provisions of the Act clearly include preservation and improvement of soil fertility and promotion of the land's economic use as factors to be considered in governing the size of allotments.[16] The court held that a policy based on administrative convenience could not be persuasive when the statute expressed a contrary meaning. It met the administrative construction argument by saying that no legislative acquiesence could be deemed meaningful in the light of an unambiguous statute.

III. Exhaustion of Administrative Remedies

Ex parte Allstate Insurance Co.[17] showed that the doctrine of exhaustion of administrative remedies is truly discretionary with South Carolina courts. The South Carolina Supreme Court had said this before,[18] but this was its first chance to prove it. The court found that the Insurance Commissioner was clearly acting beyond his statutory delegated powers in investigating the respondent companies' political activities. Because the investigation was so clearly beyond the Commissioner's authority, the court held that the circuit court had not erred in taking original jurisdiction.

In early March 1966, the South Carolina legislature was considering a uniform rate bill for automobile insurance. The insurance companies, through advertisement and letters to policy holders, opposed the legislation as detrimental to free enterprise contending that the rate fixing law would eliminate competition in automobile insurance sales. The House of Representatives passed a resolution condemning these publications as misleading and requested that the Insurance Commissioner investigate. The Commissioner began the investigation and the respondents asked the circuit court for an injunction. It was granted on the ground

15. Soil Conservation and Domestic Allotment Act, 16 U.S.C.A. § 590 (1935).

16. *Id.* § 590(g). The act states: "(a) It is declared to be the policy of this chapter also to secure, and the purposes of this chapter shall also include, (1) preservation and improvement of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wasteful and unscientific use of national soil resources. . . ."

17. 248 S.C. 550, 151 S.E.2d 849 (1966).

18. *See* Meredith v. Elliott, 247 S.C. 335, 147 S.E.2d 244 (1966); Pullman Co. v. Public Serv. Comm'n, 234 S.C. 365, 108 S.E.2d 571 (1959).

that the investigation was outside the Commissioner's jurisdiction.

The Commissioner argued that the case should have gone before him first with later appeal to the supreme court. But the supreme court, in affirming the lower court's action, stated that exhaustion of administrative remedies was dependent on "proper exercise of the discretion of the court," and that "situations can exist where failure to exhaust administrative remedies may be excused."[19]

The respondents were accused of violating section 37-1205 of the Code. That section makes it unlawful to circulate or to publish misleading statements "with respect to the business of insurance or with respect to any person in the conduct of his insurance business."[20] The stated purpose of the chapter in which this section appears is to regulate unfair trade practices,[21] not political activities. The court said that so far as regulation of political activities was concerned the Commissioner was "obviously without such authority," and therefore the lower court had acted properly.

In the application of the "exhaustion" rule, three factors have been suggested: "(1) extent of injury from pursuit of administrative remedy, (2) degree of apparent clarity or doubt about administrative jurisdiction, and (3) involvement of specialized administrative understanding."[22] It may be helpful to use these factors as a check list. Here it was clear that the Commissioner lacked jurisdiction. There was no question of whether administrative expertise was needed because the "issue was solely one of law."[23] As to the possible adverse consequences of allowing administrative action, the court said that, "[t]he commissioner had the authority to apply direct sanctions against the companies and their agents, either by way of contempt for failure

19. *Ex parte* Allstate Ins. Co., 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966).

20. S.C. CODE ANN. § 37-1205 (Cum. Supp. 1966). The Code section states: "No person shall make, publish, disseminate, circulate or place before the public or cause, directly, or indirectly, to be made, published, disseminated, circulated or placed before the public in a newspaper, magazine or other publication, in the form of a notice, circular, pamphlet, letter or poster, over any radio station, television, or in any other way of [an] advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business which is untrue, deceptive or misleading."

21. S.C. CODE ANN. § 37-1202 (1962).

22. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.30, at 67 (1958).

23. *Ex parte* Allstate Ins. Co., 248 S.C. 550, 567, 151 S.E.2d 849, 855 (1966).

of the witnesses to testify or by revocation of their authority to do business in this state."[24] Thus all the criteria pointed to the result that intervention by the circuit court was proper.

IV. Licensing: Separation of Functions

Wagner v. Ezell[25] points to an important administrative law problem—the proper separation of investigative and adjudicative functions. Wagner operated an optometry office in a Charleston G-E-X store, a discount house for government employees. His office was an integral part of the complex and he advertised in the G-E-X catalogue. The South Carolina Board of Optometry Examiners had revoked appellant Wagner's license because of his business and advertising practices. Wagner argued that his activities had not violated the statutes and in any case that the procedure followed by the Board constituted reversible error. Rejecting both arguments in a split decision the South Carolina Supreme Court affirmed the board's action.

From an administrative law viewpoint, an interesting argument for reversal stemmed from the procedure followed by the Board. Prior to the hearing, four of the five board members made a preliminary investigation presumably to decide whether to take action against the appellant. The court said that the members "talked with Wagner . . . and generally looked over the entire operation."[26] In his appeal Wagner raised the question: "Should the members of the Board have disqualified themselves because they had acquired independent knowledge relative to the issues involved?"[27]

There is no way of determining whether the Board was biased because of its preliminary investigation. The use of information not in the record is often held reversible error.[28] But here the incompleteness of the statute which set up the Board[29] made the use of such an investigation excusable. There is no statutory provision for an independent investigating body, and the Board had to fulfill the often conflicting duties of investigator and adjudicator.

24. *Id.*
25. 154 S.E.2d 731 (S.C. 1967).
26. 154 S.E.2d at 733-34.
27. 154 S.E.2d at 736.
28. *See,* Annot., 18 A.L.R.2d 552 (1951).
29. S.C. Code Ann. § 56-198 (1962).

Professor Davis says that "separation of functions has to do with the problem of preventing contamination of judging by the performance of inconsistent functions, including primarily prosecuting and investigating, and secondarily instituting proceedings. . . ."[30] He thinks it permissible that one agency perform all these functions so long as there is sufficient internal separation.[31] The Administrative Procedure Act provides for internal separation of federal administrative agencies.[32]

As undesirable as such a conflict of interests may be, case law, both federal and state, generally rejects the idea that combining these functions is a denial of due process.[33] The South Carolina Supreme Court followed the weight of authority. Borrowing from an A.L.R. annotation,[34] it held that participation by the hearing body in the initiating investigation does not disqualify the body from later judging at the hearing.

V. JUDICIAL REVIEW: INCOMPLETENESS OF THE RECORD

State Board of Medical Examiners v. Gandy[35] echoes the earlier South Carolina Supreme Court decision of *Drake v. Raybestos-Manhattan, Inc.*[36] In both instances the court had to remand the case to the agency for a more definite finding of fact. *Drake* appears in the 1962 Survey of South Carolina Law and a comment made there clearly applies to *Gandy*:

> The absence of the necessary findings makes it impossible for the reviewing tribunal to determine precisely what the facts are. . . . [T]he agency must squarely rule upon the issue, for otherwise the court is being forced to make what are essentially fact findings. This is, of course, contrary to the basic premises of judicial review of administrative action, and quite correctly the court rejects any invitation to assume the duties of the agency.[37]

The Board of Examiners had revoked Gandy's license to practice medicine amid charges of misconduct. It did not specify

30. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1391, at 171 (1958).
31. *Id.*, § 1305 at 204.
32. 5 U.S.C. § 1991 (1964).
33. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1302, at 175 (1958).
34. Annot., 97 A.L.R.2d 1214 (1964).
35. 248 S.C. 300, 149 S.E.2d 644 (1967).
36. 241 S.C. 116, 127 S.E.2d 288 (1962).
37. Folk, *Administrative Law,* 16 S.C.L. REV. 1, 17 (1962).

which of the charges it had found to be true. The South Carolina Supreme Court does not always require specific findings of fact by administrative boards.[38] The court said that if the basis of the general findings of an agency were discernible, it would review the decision. Therefore, in South Carolina a record is sufficient if it enables the court properly to perform its function of review.

VI. HEARINGS: DUE PROCESS AND THE RIGHT TO GOVERNMENT EMPLOYMENT

In *Williams v. Sumter School District Number 2*[39] the district court held that a refusal to renew a Negro school teacher's work contract because of her civil rights activities was a denial of her constitutional rights.

South Carolina school districts are under the management of boards of trustees.[40] These trustees are vested with broad powers to employ and discharge teachers, subject to the supervision of the county boards of education.[41] In *Williams* the board of trustees argued that the plaintiff's proper remedy was an appeal to the county board,[42] but the court granted the plaintiff's plea for relief and threatened to issue a mandamus order unless the complaint was satisfied.

Perhaps the court so readily threatened to issue a mandamus order because of the type of hearing the plaintiff was given. The board had refused to tell her why she was not being rehired. That meant that the hearing was conducted without due process of law. The question before the court was whether the due process safeguards should have been applied in this case. The defendants argued that the schoolteacher's rights could not have been violated because there is no vested right to public employment.

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38. *E.g.*, Atlantic Coast Line R.R. v. South Carolina Pub. Serv. Comm'n, 245 S.C. 229, 139 S.E.2d 911 (1965); Long Motor Lines, Inc. v. South Carolina Pub. Serv. Comm'n, 233 S.C. 67, 103 S.E.2d 762 (1958); Cole v. State Highway Dept., 190 S.C. 142, 2 S.E.2d 490 (1939).

39. 255 F. Supp. 397 (D.S.C. 1966).

40. S.C. CODE ANN. § 21-221 (1962).

41. S.C. CODE ANN. § 21-230(2) (1962).

42. Pressley v. Nunnery, 169 S.C. 509, 169 S.E. 413 (1933), holds that the county board does have the authority of an appellate tribunal over the board of trustees.

Since 1892 the United States Supreme Court has consistently said that there is no right to public employment.[43] The Court has, however, diluted this rule and as Professor Davis points out, "The Supreme Court is quite capable of casting logic to the winds when it discusses rights and privileges."[44] The Court has held that to say a person has no right to public employment means only that he has no right not to comply with reasonable, lawful and non-discriminatory terms laid down by the proper authorities.[45] Davis says this variation of the principle shows the Court's willingness to subordinate the "no privilege of government employment doctrine" to the Court's conception of the needs of justice.[46] This was the policy followed in this case. Here the court quoted from a very recent Fourth Circuit opinion:

> The plaintiffs are as a class entitled to an order requesting the Board to set up definite objective standards for the employment and retention of teachers and to apply them... in a manner compatible with the Due Process and Equal Protection clauses of the Constitution.[47]

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43. Bailey v. Richardson, 341 U.S. 918 (1951); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

44. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.11, at 453 (1958).

45. Slochower v. Board of Higher Educ., 350 U.S. 555 (1956).

46. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.12, at 460 (1958).

47. Chambers v. Henderson City Bd. of Educ., 364 F.2d 189, 193 (4th Cir. 1966).