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## Administrative Law

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## PART I

### ADMINISTRATIVE LAW

ERNEST L. FOLK, III\*

#### 1. *Judicial Decisions*

In contrast to last year's important Administrative Law decisions,<sup>1</sup> this area gave rise to no important rulings by the Supreme Court of South Carolina during the survey period.

*Stanley v. Gary*,<sup>2</sup> properly applied the well-settled rule requiring exhaustion of administrative remedies. A demand was made that a court oust a high school principal from his position because of his discipline, actual and threatened, of certain students who had, in effect, conducted a group boycott against drinking a certain brand of milk served in the high school cafeteria. The trial court's granting of a demurrer to the action was unanimously sustained on appeal, on the ground that the relevant statutes<sup>3</sup> afforded adequate administrative remedies which the plaintiffs in this action had ignored. Necessarily, school discipline rests initially in the hands of the school's own administrative personnel, by delegation, as the Court found, from the statutory authority of a school district's board of trustees to "suspend or dismiss pupils when the best interests of the schools make it necessary."<sup>4</sup> Any such action is reviewable by the county board of education "which shall try the matter de novo,"<sup>5</sup> and its decision in turn is subject to "trial by the Circuit Judge de novo with or without reference to a master or special ref-

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1. Folk, *Administrative Law, 1960 Survey S. C. Law*, 13 S. C. L. Q. 31 (1960) for comment on these decisions. Several important decisions handed down after the date of the survey period will be discussed in detail in next year's issue.

2. 237 S. C. 237, 116 S. E. 2d 843 (1960).

3. CODE OF LAWS OF SOUTH CAROLINA §§ 21-103, 21-230, and 21-247 to 247.7 (1952).

4. CODE OF LAWS OF SOUTH CAROLINA § 21-230 (1952). "The general powers granted to school trustees by Section 21-230 . . . clearly permit the trustees to delegate to the principal and superintendent of a school the authority to suspend or dismiss pupils when the best interests of the schools make it necessary." *Stanley v. Gary*, 237 S. C. 237, 245, 116 S. E. 2d 843, 847. Alternatively, the Court noted the "inherent power" of a principal or superintendent to "suspend a pupil in a proper case" unless the principal's delegated power has been revoked. *Ibid.*

5. CODE OF LAWS OF SOUTH CAROLINA § 21-247.2 (1952).

eree,"<sup>6</sup> with normal rights of appellate review thereafter. Thus, as the Court ruled, relying on the numerous prior decisions interpreting and applying the exhaustion rule, the plaintiffs should pursue their administrative remedies "in the interest of orderly procedure"<sup>7</sup> before turning to the courts. This reasoning is especially compelling where, as here, unusually ample review rights—in the form of two de novo hearings—are available. There is nothing in the opinion to suggest that any of the grounds justifying the suspension of the exhaustion rule should be available here.<sup>8</sup>

The Workmen's Compensation cases produced the usual spate of dicta regarding the scope of judicial review of awards of the Industrial Commission. On the Commission level, the claimant must establish the facts entitling him to an award by a "preponderance of the evidence."<sup>9</sup> However, once the award is made, it will be judicially upheld, if there is "any competent evidence in the record" to support the findings.<sup>10</sup> The occasional language variations from the proposition, *e.g.*, whether there is "evidence to sustain" the award<sup>11</sup> or "any evidence reasonably tending to support the conclusions of the Commission,"<sup>12</sup> seem not to reflect any different concept of the scope of review. Stated negatively, the award cannot be based on "surmise, conjecture, or speculation"<sup>13</sup> or merely upon the "resolution of doubts,"<sup>14</sup> all of which seemingly come to the same thing. The Court made clear that if there is a conflict of evidence before the Commission, either of different witnesses or of the same witness, the Commission fact

6. CODE OF LAWS OF SOUTH CAROLINA § 21-247.5 (1952).

7. *Stanley v. Gary*, 237 S. C. 237, 246, 116 S. E. 2d 843, 847.

8. Some of the exceptions are discussed in Folk, *Administrative Law, 1960 Survey S. C. Law*, 13 S. C. L. Q. 31-34 (1960).

9. *Cross v. Concrete Materials*, 236 S. C. 440, 446, 114 S. E. 2d 828, 831 (1960).

10. *Fowler v. Abbott Motor Co.*, 236 S. C. 226, 229, 113 S. E. 2d 737, 739 (1960); *Cross v. Concrete Materials*, 236 S. C. 440, 448, 114 S. E. 2d 828, 832 (1960); *Steed v. Mount Pleasant Seafood Co.*, 236 S. C. 253, 256, 113 S. E. 2d 827, 828 (1960); *Glover v. Columbia Hosp. of Richland County*, 236 S. C. 410, 415, 114 S. E. 2d 565, 567 (1960).

11. *Halpern v. De Jay Stores, Inc.*, 236 S. C. 537, 592, 115 S. E. 2d 297, 300 (1960).

12. *Corley v. S. C. Tax Comm.*, 237 S. C. 439, 441, 117 S. E. 2d 577, 578 (1960).

13. *Glover v. Columbia Hosp. of Richland County*, 236 S. C. 410, 414, 114 S. E. 2d 565, 567 (1960); *Fowler v. Abbott Motor Co.*, 236 S. C. 226, 229, 113 S. E. 2d 737, 739 (1960).

14. *Cross v. Concrete Materials*, 236 S. C. 440, 446, 114 S. E. 2d 828, 831 (1960).

findings are "conclusive."<sup>15</sup> This merely recognizes the truism that the trier of facts—whether agency or court or jury—is in a better position to deduce the truth from hearing and seeing the witnesses than the appellate court from what is preserved in the written record.

*Cross v. Concrete Materials*,<sup>16</sup> is of interest because of its clarification of the vague canon of "liberal construction" so often said to apply to regulatory statutes administered by agencies. This rule means that a given *law*, in this case the Workmen's Compensation law, "will be construed liberally in order to effect its beneficent purpose."<sup>17</sup> But the standards of proof before the administrative body, and the scope of review of the evidence on review of the Commission's decision, are not to be distorted or overridden in pursuit of a "liberal construction." The Court's approach thus rejects the view that "any doubt as to whether evidence sustains the award must be resolved in favor of the determination of the Commission" and leaves intact the rule of "any competent evidence in the record."<sup>18</sup>

## 2. Legislation

The administrative process received attention at the General Assembly's 1961 Session, which enacted two important new regulatory statutes—the Uniform Securities Act,<sup>19</sup> administered by the Securities Commission (The Secretary of State who is *ex officio* the Commissioner), and the Dairy Commission Law,<sup>20</sup> administered by a ten member Dairy Commission. The most striking feature of the Uniform Securities Act,<sup>21</sup> from an administrative standpoint, is the broad discretion vested in the Securities Commissioner as administrator of the statute. Of course, this is essential if the statute is to protect the public from securities frauds; this is an area in which the ability to take fast action outweighs the possible disadvantage to the issuer seeking to float a security publicly. Thus, in the registration of securities by two of the three prescribed methods the Commissioner may require "ad-

15. *Steed v. Mount Pleasant Seafood Co.*, 236 S. C. 253, 256, 113 S. E. 2d 827, 828 (1960); *Glover v. Columbia Hosp. of Richland County*, 236 S. C. 410, 418, 114 S. E. 2d 565, 569 (1960).

16. 236 S. C. 440, 114 S. E. 2d 828 (1960).

17. *Id.* at 446, 114 S. E. 2d at 831.

18. *Id.* at 448, 114 S. E. 2d at 832.

19. Act No. 159 of 1961.

20. Act No. 319 of 1961.

21. Act No. 159 of 1961.

ditional information" besides that called for by the statute.<sup>22</sup> In all cases, he may authorize the omission of "any item of information or documents from any registration statement."<sup>23</sup> The broadest grant of administrative power relates to issuing, on nine separate grounds, "stop orders," the effect of which is to bar the sale within the State of the security which is the subject of the order.<sup>24</sup> This includes the entry of a summary order on notice but with opportunity for hearing postponed.<sup>25</sup> There are powers of similar scope as to registration of broker-dealers and others who do business in the securities field.<sup>26</sup> Much of the statute depends for its effectiveness upon the rules and regulations to be issued by the Commissioner, and Section 412 of the Act sets forth general requirements for rule-making, as well as for other types of administrative action by the Commissioner.

The Dairy Commission Act<sup>27</sup> established a new administrative agency with state-wide jurisdiction and the usual panoply of administrative powers to enforce the substantive requirements of the bill—a stable price structure in the dairy industry to be achieved by agency licensing of milk distributors, fixing of minimum prices, and prohibition of various unfair trade practices in the industry.<sup>28</sup> The Commission's chief disciplinary weapon is its power to suspend and revoke licenses of distributors and subdistributors,<sup>29</sup> and to take similar action against permits to bring milk into the state from out of state.<sup>30</sup> The Commission has broad authority to fashion rules and regulations "necessary to make the provisions of this act effective and to insure the proper enforcement thereof."<sup>31</sup> Any "order or act of the commission" is judicially reviewable at the instance of "any person . . . aggrieved" thereby.<sup>32</sup> However, review is broader than customary, since

22. Securities may be registered (1) by *notification* under Section 302 (a simple method for qualifying seasoned issues), (2) by *coordination* with SEC registration under Section 303, and (3) by *qualification* under Section 304 (full registration of the security with the Commissioner). Additional information may be required for registration by notification, Section 302 (b) (7), and by qualification, Section 304 (b) (17).

23. Act No. 159 of 1961, § 305 (e).

24. *Id.* at § 306.

25. *Id.* at § 306 (b).

26. See generally §§ 201-204, Act No. 159 of 1961.

27. Act No. 319 of 1961.

28. *Ibid.*

29. *Id.* at § 5.

30. *Id.* at §§ 9, 10, and 12.

31. *Id.* at § 14(A).

32. *Id.* at § 14(A) (3).

it is granted not only on the administrative record but also "on such additional evidence as the parties offer, subject to the rules of evidence as enforced in other legal proceedings."<sup>33</sup> The Commission is also empowered to require licensees to maintain records which are available for Commission inspection, as are the premises where products are processed, stored, etc.<sup>34</sup>

The Commission has the usual powers to subpoena witnesses and documents.<sup>35</sup> The ambiguous wording of the statute seemingly suggests that on refusal, the Commission need only apply to a court for an order by which the recalcitrant person "may be punished for contempt of court."<sup>36</sup> If this is so, the Commission has the advantage of an abbreviated procedure for subpoena enforcement. Usually, the agency (a) issues its subpoena, and upon disobedience to the subpoena (b) requests a court to enforce the subpoena; but (c) even if granted the agency may have to go back to the court for a contempt citation if the witness still refuses to comply. In this lengthy procedure, there are two judicial rulings, *viz.*, enforcement order and contempt citation, each subject to appellate court review. If the dairy commission's power is interpreted as the statute literally reads, the second step in the subpoena-enforcing procedure is eliminated, and the agency may go directly from disobedience to its order to a contempt citation in the court.<sup>37</sup> Needless to say, on the application for a contempt citation, the court is empowered to review the subpoena on the usual grounds—reasonableness, oppressiveness, etc.—as no court is called upon to rubber-stamp an agency subpoena. There is much to be said for this shortened procedure, since delay in enforcing subpoenas stymies the agency at an initial phase of its investigation. This delay is particularly, perhaps dangerously, unfortunate in the case of a product as perishable as milk.

A bill<sup>38</sup> was also introduced in the Senate which would have prevented any "order, regulation or rule" of any exec-

33. *Ibid.*

34. *Id.* at § 14(D).

35. *Id.* at § 14(I).

36. *Id.* at § 14(I) (1).

37. Compare the enforcement procedure in the Workmen's Compensation statute, CODE OF LAWS OF SOUTH CAROLINA § 72-63 (1952).

38. The bill, S. 50, 94th Gen. Assembly, 1st Sess. (1961), was referred to the Senate Judiciary Committee. See Senate Journal No. 5, p. 23 (1961).

utive or administrative agency ("other than the judicial department") from taking effect unless both houses of the General Assembly had first approved it, and the "order, rule or regulation" had been filed for thirty days thereafter. Needless to say, such a bill, were it to become law, would break down the administrative machinery of government.

(a) Its scope is such that every award of the Industrial Commission, every order of the Public Service Commission, and so on through the infinite variety of administrative orders, would first have to secure legislative approval.<sup>39</sup>

(b) Even if "orders" were exempted, the effectiveness of administrative action would still necessarily be postponed or altogether blocked unless the legislature took the initiative and acted upon the matter.

(c) Whatever the scope of application of the bill, there is no indication of the status of administrative action during that greater part of the year when the legislature is out of session. Presumably, all rules, regulations and orders would have to await the convening of the General Assembly to be acted upon. And if it is thought that a standing committee might exercise the power to approve or disapprove during the months when the legislature is not sitting, it would be necessary to ask whether such a function assigned to the whole legislature could be delegated to a committee.

(d) The experience of a few states which have had such a law, even in a much refined version, has revealed the unworkability of such a procedure because of the delays in administrative action.<sup>40</sup>

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39. The unlimited term "order" would seemingly include all interlocutory agency orders and determinations.

40. Michigan has long had such a law, limited, however, to rules and regulations promulgated by agencies. The effect here has been to deter agencies from issuing rules and regulations, and instead to rely on orders, thus doing their administrative tasks on a case-by-case basis like the courts. This, of course, is undesirable, since administrative agencies are expected to regulate and plan for the future and they should be encouraged to do so by rule-making. See *SEC v. Chenery Corp.*, 332 U. S. 194, 91 L.Ed. 1995 (1947).

A similar proposal (H. R. 6774) was introduced in the Congress to require prior congressional approval on all rules changes by federal agencies prior to their becoming effective. Although this bill was limited only to rules, and did not extend to orders in cases of adjudication, it was opposed unanimously by the House of Delegation of the American Bar Association. The bill was not approved by either the Senate or the House of Representatives.