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ADMINISTRATIVE LAW

Of the several decisions handed down during the review period in the field of Administrative Law, on both the federal and state levels, few are indicative of substantial change in the previous trends and attitudes of the courts to the administrative process. The importance of the cases collected and reported herein must be found in the refinement of the court's attitude to its limited role in judicial review, the respect shown by the courts for the reviewing capacities of the boards within the various commissions themselves, and, generally, in the realization that administrative agencies play an ever increasing role in regulating our day-to-day affairs.

I. JUDICIAL REVIEW

Statutes creating various state and federal administrative agencies usually provide a definite procedure for appealing from the administrative mandates or rulings. *United States v. Southern Railway*[1] emphasizes the importance of strict adherence to the statutory formulation.

Due to a shortage of railroad cars the Interstate Commerce Commission declared that an "emergency situation" existed. Car Service Order 947 was promulgated to alleviate the problem of strict requirements regarding the placement of loaded cars at the disposal of the consignee and the subsequent removal of cars once unloaded. The Commission indicated that notice and public hearing were impracticable and contrary to the public interest and that good cause existed for making the order effective on less than the usual thirty day notice.[2] The Commission is authorized, when an emergency presents itself and immediate action is required, to dispense with the notice requirement.[3] A copy of the order, which was to become effective four days later, was served on the Association of American Railroads, agent for most of the nation's railroads, including Southern. Being thus notified, Southern could have filed a petition for "rehearing, reargument or re-

1. 380 F.2d 49 (4th Cir. 1967).
2. *See* 5 U.S.C. § 1003(c) (1964).
3. *See* 49 U.S.C. § 1(15) (1964). Usually such orders are issued only after a hearing at which interested carriers might voice their views, but this statute allows the hearing to be bypassed if an emergency requiring immediate action exists.

consideration" in advance of the effective date, and the implementation of the Commission's order would have been automatically stayed;[4] but this was not done.

Southern was charged with twenty violations in its Greenville, South Carolina yard, and the maximum fine, $500 per count, was asked by the Commission. Southern contested this, taking the position that the order should not be interpreted to mean liability without fault, asserting that all of the charged violations, except one, were occasioned by two derailments. Southern declared that its major efforts from January 28, 1964 to March 1, 1964 were concentrated on repairing damaged tracks to insure an uninterrupted flow of traffic. They further contended that no "emergency situation" existed to justify disregard for the hearing requirements[5] because the condition had been apparent to the Commission since 1955.

After hearing conflicting testimony as to whether Southern acted in the most expeditious manner and as to whether compliance was either impossible or unreasonable, the district court ruled that the Commission's order was open to attack and granted Southern's motion for summary judgment.[6] The order was held to be a "sweeping pronouncement," the court reasoning that it "sought to deal with a chronic problem, not an emergency."[7]

On appeal to the Fourth Circuit, the verdict in favor of Southern was reversed on the procedural ground that the district judge erred in entertaining Southern's motion at all when the statute expressly provided a method for appeal.[8] This decision is in accord with a Fifth Circuit decision, in which the issues were strikingly similar,[9] and with several Supreme Court decisions. Those decisions establish the principle that when Congress or state legislatures provide for administrative or judicial review, designed to permit agency

4. 49 U.S.C. § 17(8) (1964).
5. 49 U.S.C. § 1(15) (1964); *see* United States v. Southern Ry., 364 F.2d 86 (5th Cir. 1966).
6. United States v. Southern Ry., 250 F. Supp. 759 (D.S.C. 1966).
7. *Id.* at 764.
8. 28 U.S.C. § 2325 (1964) provides: "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of *three judges* . . ." (emphasis added).
9. United States v. Southern Ry., 364 F.2d 86 (5th Cir. 1966).

expertise to be brought to bear upon particular problems, the prescribed procedures become exclusive avenues of appeal.[10]

The important role of the review procedure within an administrative agency is pointed out in *NLRB v. Winn-Dixie Greenville, Inc.*[11] Employees of Winn-Dixie had been questioned about their activities of "signing-up" drivers for the union. One of those questioned, Smith, did eventually sign twenty drivers and engaged in union activities for six weeks before he was discharged for violating various rules of the company and for having a generally unsatisfactory attitude. The trial examiner ruled that, although the company displayed unconcealed opposition to unionization,[12] their discharge of Smith had been spontaneous. Smith appealed the decision and in its review the Board accepted the subsidiary factual findings of the trial examiner but rejected his ruling. The Board concluded that the most reasonable inference to be drawn from the whole record was that Smith had been unlawfully discharged for union activities.

The defendant objected to the rejection of the trial examiner's ruling, but the court, following *NLRB v. Thomason Plywood Corp.*,[13] reiterated its contention that the Board's decision, even though contrary to the examiner's, will be upheld if supported by substantial evidence on the whole record. The Supreme Court has said of the relationship between the labor board and its trial examiners: "The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse the examiner's findings only when they are 'clearly erroneous.' "[14]

It is noteworthy in *Winn-Dixie Greenville, Inc.* that in its own review the NLRB was not bound by rule 52(a) of the Federal Rules of Civil Procedure as any federal district court would have been. (A federal district court would be bound, in all actions tried without juries, to find the facts specially.) The non-applicability of this rule shows that the

10. *See, e.g.*, Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 (1965); Callanan Rd. Improvement Co. v. United States, 345 U.S. 507 (1953); United States v. Ruzicka, 329 U.S. 287 (1946); Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

11. 379 F.2d 958 (4th Cir. 1967).

12. The attitude of Winn-Dixie toward unionization is reflected by the question asked of Smith by a company vice-president: "What the hell is this I hear about you signing up drivers?" *Id.* at 959.

13. 222 F.2d 364 (4th Cir. 1955).

14. Universal Camera Corp. v. NLRB, 340 U.S. 474, 492 (1951).

powers of review within an administrative agency over a decision of a trial examiner are greater than those of an appellate court reviewing a decision of a trial judge.[15]

II. ADMINISTRATIVE HEARINGS: RIGHTS OF ONE ACCUSED

In *City of Spartanburg v. Parris*,[16] the right to be confronted with one's accuser and to cross-examine him in an action before the Civil Service Commission was explored. The opinion is valuable for its conciseness and the clarity with which its principle is stated.

Parris, a police officer of the City of Spartanburg, was discharged for several reasons, including accepting a gift from a suspect being investigated by him. Much of the evidence presented against Parris in the Civil Service Commission proceeding was contained in the affidavit of one Calvin Honeycutt whom the court described as "an unsavory character with a long criminal record." On appeal, the circuit court held that the admission of the affidavit and the consequent denial of Parris' right to be confronted with his accuser was reversible error. The circuit court ordered the case remanded to the Commission with instructions to rehear the case within thirty days, to examine Honeycutt in person, or to reinstate Parris with pay.

On appeal, the supreme court ruled that though strict rules of evidence are not applicable to the hearings of administrative agencies, the substantive rights of the parties must be preserved. While the supreme court did agree that fundamental fairness required exclusion of the Honeycutt affidavit, it modified the circuit court ruling that Parris be reinstated with pay unless there was a hearing at which Honeycutt appeared within thirty days. A new hearing was ordered, but the city was given the option of having Honeycutt appear or of trying Parris without relying on the affidavit at all.

Parris indicates that persons tried before administrative agencies do have certain rights of confrontation and cross-examination. In this case the rights were protected, however, by rules of evidence and the constitutional due process issue was thus avoided. It is doubtful that the *Parris* decision will

15. *See also* NLRB v. A.P.W. Products Co., 316 F.2d 899 (2d Cir. 1963).
16. 161 S.E.2d 228 (S.C. 1968).

have affect on the loyalty-security type of administrative investigation or review. In those cases,[17] persons who have years of experience and clean records in government employ have been summarily dismissed because of charges made by "unidentified informants." The opinions of our courts in this loyalty-security area deny the existence of any constitutional rights of the accused; the right to fair trial seemingly existent only where national security is not at issue. *Parris* may be differentiated in at least two ways from the security type investigation decisions: (1) national security was not involved; and (2) the identity of the accuser was not withheld. Only to this extent can *Parris* be cited as a sound precedent for defining the rights of an accused in an administrative proceeding.

III. ADMINISTRATIVE RULINGS

Another interesting controversy, to which an administrative board was a party, might be cited for a rule, sounding in contract, but applying to administrative procedure: When an administrative ruling is sought of and given by a proper administrative board, and the persons seeking the ruling thereafter act in good faith reliance to their financial detriment, the board, under ordinary circumstances, is without the power to reverse its original ruling. In *Nuckles v. Allen*[18] the South Carolina Supreme Court found a certain "property right" vested in the concerned party who relied on the ruling, stating that a finding of public necessity would be required before the board would have the power to reverse itself. The position taken by the court is in accord with the general attitude toward this type of problem.[19]

Once again the Industrial Commission was challenged several times for decisions in their workmen's compensation proceedings. *McDonald v. Kenneth Cotton Mills*[20] clarified the role of judicial review of an Industrial Commission ruling. The circuit court misinterpreted *Dennis v. William's Furniture Corp.*[21] to mean that the Commission's findings of fact

17. *See, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959).
18. 250 S.C. 123, 156 S.E.2d 633 (1967).
19. 2 AM. JUR. 2d *Administrative Law* § 525 (1962).
20. 250 S.C. 51, 156 S.E.2d 324 (1967).
21. 243 S.C. 53, 132 S.E.2d 1 (1963). In this decision the Commission ruled "as a fact" that the claim in question had been filed within one year. The circuit court reversed the Commission, and the supreme court sustained

were only conclusions of law and therefore reviewable. Thereupon, they misapplied *Glenn v. Dunean Mills*[22] and endeavored to review the evidence "in the light most favorable" to the claimant. Laboring under these misconceptions, the circuit court reviewed all of the evidence in a light most favorable to the claimant and awarded McDonald compensation. The supreme court reversed, indicating that by statutory mandate the decision of the Commission is conclusive on all issues of fact[23] and that the circuit court was limited in its review to pointing out errors of law.

In other decisions the reviewing powers within the Industrial Commission were scrutinized. *Shealy v. Algernon Blair, Inc.*[24] indicates that the Commission has a duty to make a specific finding upon which compensation might rest. The Commission must be satisfied that at least two factors, wage loss and causation of wage loss by work-connected injury, are present before compensation is awarded.[25] South Carolina statutes define disability;[26] the Industrial Commission must find such incapacity to earn wages and then must award compensation only after balancing certain other factors within the statutory scheme.[27] The administrative agency must fulfill its statutory obligations or its decisions are subject to judicial review and reversal.

In *Green v. Raybestos-Manhattan, Inc.*[28] the capacity of the full Commission to make its own findings of fact and to reach its own conclusions of law (whether or not consistent with those of the hearing commissioner, and regardless of whether his holdings were based on competent evidence or based on

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because there had been no competent evidence of any causal connection between the original injury and the claimant's disability; hence, there was nothing to sustain a finding that a claim was timely filed. The Commission's finding here is reviewable as a conclusion of law or as a finding of fact without competent evidentiary support.

22. 242 S.C. 535, 131 S.E.2d 696 (1963). When a lower court has awarded benefits, the reviewing court must look at the evidence in a light favorable to the claimants to see if there was, in fact, competent evidential support for the award.

23. S.C. CODE ANN. § 72-356 (1962).

24. 250 S.C. 106, 156 S.E.2d 646 (1967).

25. 2 A. LARSON, WORKMEN'S COMPENSATION LAWS § 57.61 (1961).

26. S.C. CODE ANN. § 72-10 (1962).

27. S.C. CODE ANN. § 72-152 (1962). The statute provides a formula for compensation which is a supplement to the average amounts the employee is able to earn subsequent to a job connected accident, based on a percentage of the difference between the average salary before and after the injury.

28. 250 S.C. 58, 156 S.E.2d 318 (1967).

credibility of the witness) was recognized. The court ruled, however, that in its review of the facts, the Commission must take into account all of the evidence, and that the taking of and relying on unsworn testimony of part of the witnesses constituted reversible error.

Green was discharged from Raybestos in June 1965 and, shortly thereafter, filed claim under the Workmen's Compensation Law for a 1963 back injury. The hearing commissioner ruled that Green had failed to give proper notice to both his employer and the Workmen's Compensation Commission.[29] After examining the claimant informally, the Commission disagreed with and overruled the hearing commissioner. The full Commission has broad powers of review,[30] but because in this type of situation the credibility of witnesses is of key importance to the determination of the case, it is important that the Commission take all of the testimoney from all of the witnesses and pass on the credibility of each. This requirement does not curb the power of the full Commission to make its own findings of fact and to reach its own conclusions of law, consistent or inconsistent with the hearing commissioner, but the added requirement does assure that on reaching its decision the full commission has the opportunity to review all of the evidence.

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29. S.C. CODE ANN. §§ 72-301, -303 (1962). Proper notification to an employer must be within thirty days; the Workmen's Compensation Commission must be notified within one year.
30. S.C. CODE ANN. § 72-355 (1962).