South Carolina Law Review

Volume 26 | Issue 2 Article 3

Summer 6-1-1974

Administrative Law

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ADMINISTRATIVE LAW

I. ALCOHOLIC BEVERAGE CONTROL COMMISSION

The South Carolina Alcoholic Beverage Control Commission issues all retail permits authorizing the sale of beer and wine.[1] In determining whether to grant a permit, the commission must ascertain, among other things, the suitability of the retailer's business location.[2] The legislature intended to vest in the commission a rather broad discretion in evaluating the fitness or suitability of a particular location.[3] Furthermore, the commission's exercise of discretion may not be altered by the courts unless its determination is wholly without evidentiary support.[4] On two recent occasions, the South Carolina Supreme Court reviewed commission determinations of unsuitable location and subsequent denials of retail permits.

In *Fowler v. Lewis*,[5] the supreme court discerned ample evidence to support the commission's denial of a retail beer and wine permit and reversed the decision of the lower court. Plaintiff Fowler, the operator of a large grocery store and laundrette at a five-cornered intersection in Union, South Carolina, applied to the commission for an unconditional permit which would allow the sale of chilled beer for off premises consumption only. The commission denied the application on the grounds of unsuitable location. Although other businesses were located at all corners of the intersection, the surrounding area was predominantly residential. Several low-cost housing projects were nearby and Fowler's estab-

1. S.C. CODE ANN. § 4-211 (Cum. Supp. 1973) provides:

> Every person engaged in the business of selling beer, ale, porter, wine or any beverage which has been declared to be nonalcoholic and nonintoxicating under the provisions of § 4-201 shall apply to the South Carolina Alcoholic Beverage Control Commission for a permit to sell such beverages. . . . Retail dealers shall pay to the Commission forty dollars per annum for retail permits . . . . But retail permits may be issued by the Commission for the sale of beer for consumption off of the premises of the retailer for five dollars per annum.

2. *Id.* § 4-212 (1962) provides:

> No permit authorizing the sale of beer and wine shall be issued unless:
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> . . .
>
> (6) The location of the proposed place of business of applicant shall in the opinion of the . . . Commission be a proper one.

3. Smith v. Pratt, 258 S.C. 504, 189 S.E.2d 301 (1972). *See Administrative Law*, 25 S.C.L. REV. 319, 324-26 (1973) for a full discussion of *Smith*.

4. Feldman v. South Carolina Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943).

5. 260 S.C. 54, 194 S.E.2d 191 (1973).

lishments were surrounded by a large parking area. The parking area was bounded on the rear by an unused school and playground. Because Fowler's businesses remained open until late hours, people from the surrounding residential area tended to congregate in the laundrette and parking area.

Issuance of the permit was opposed by Union's Chief of Police, his assistant, and a patrolman. All three testified that the granting of an unconditional permit with a voluntary stipulation allowing the sale of chilled beer for off premises consumption would create an additional burden on local law enforcement. According to the police officers, arrests for drunkenness and fighting were numerous and automobile accidents frequent on the premises. They also testified that policing of the parking lot and surrounding area would be difficult for a small police department. The record thus clearly demonstrated that, with no cold beer available in the area, congregations of people on Fowler's property were frequently accompanied by consumption of alcohol and public disorder. The supreme court, in reversing the lower court, found that the commision could have reasonably inferred from the testimony of record that, by making cold beer readily available, the situation would be exacerbated. Consequently, substantial evidence supported the commission's determination that Fowler's business location was unsuitable.

Although the court in *Fowler* needed only to determine whether the commission's decision was without evidentiary support, it missed an opportunity to provide future reviewing courts with some guidance as to what types of evidence may properly reflect upon the suitability of a business location. As applied to the facts of *Fowler*, the court could have looked to legislative standards governing the issuance of retail liquor licenses for guidance.[6] In granting retail liquor licenses, the legislature directs the commission to refuse issuance "unless the commission is assured that such locality is under proper police protection."[7] Similarly,

6. *See* Smith v. Pratt, 258 S.C. 504, 189 S.E.2d 301 (1972). In *Smith* the court looked to such legislative standards for guidance to the contention that a beer and wine permit should not be granted to a business located one thousand feet from Epworth Children's Home. Since S.C. CODE ANN. § 4-33.1 (1962) barred the granting of *liquor* licenses to establishments located within three hundred feet of any church, school, or playground, it would be illogical to bar issuance of a permit for nonalcoholic beverage sales solely on the basis of proximity to an institution possessing elements of all three when the distance involved was three times as much as the minimum distance with respect to alcoholic liquor licenses.

7. S.C. CODE ANN. § 4-37 (1962).

the legislature has also directed the commission to ". . . take into account . . . the likelihood that large crowds will gather from time to time with attendant breaches of the peace, [and] requirements of increased law enforcement officers" before granting a permit for the sale of beer and wine at a location within five miles of a foreign state which prohibits such sales.[8] Of course, neither statutory directive would be controlling in this instance; both, however, would be persuasive in arguing that increased burdens on local law enforcement, with lessened assurance of proper police protection, rendered Fowler's business location unsuitable.[9]

In *Taylor v. Lewis*,[10] the commission's determination that a business location was unsuitable for a beer permit allowing the sale of chilled beer for off premises consumption only was reversed as entirely unsupported by the evidence. Taylor operated a combination grocery store, gasoline station, and fishing supply center about one-fourth mile from Lake Greenwood. The surrounding community was about half residential and half business. There were six establishments possessing beer permits within a mile of Taylor's store. One such establishment was within two hundred feet of the applicant's location and allowed consumption of beer on the premises. Moreover, Taylor's neighborhood store had been operating with a beer permit for over five years prior to the present application.[11] In denying issuance of a permit for the sale of chilled beer, the commission did not consider any evidence showing the location to be less suitable for the sale of beer at the time of the application than during the preceding five years. Those who opposed Taylor's application asserted that the issuance of a beer license would be detrimental to the well-being of the community and that the location lacked adequate police protection.[12] The court, however, agreeing with the

8. *Id.* § 4-212.1.

9. *See* Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972).

10. 261 S.C. 168, 198 S.E.2d 801 (1973).

11. Taylor began business at the location in 1967, at which time the commission granted him a retail license for the sale and consumption of beer on the premises. Taylor operated the store under such a permit for three years until he sold the store to a third party. The new owner also received a permit and operated the store for a period of two years. Taylor repurchased the store and made the present application for a retail permit "to chill beer for sale for off premises consumption only."

12. The witnesses gave several reasons as the basis of their claims: (1) the location would be visited by persons who were intoxicated and would disturb people in nearby residential areas; (2) the safety of children in the area would be threatened; (3) the danger from the highway traffic would be increased; (4) disturbances of the peace would occur;

lower court, noted that the relevant testimony consisted entirely of opinions and conclusions which were not supported by any facts. In comparision with *Fowler*, no disturbances of the peace or congregations of people had previously occurred at the location. No representative of local law enforcement testified as to the availability of adequate police protection. The most significant and distinguishing feature between the two cases, however, was the ready availability of chilled beer in the immediate area.

In reversing the commission's decision on suitability of location, the lower court issued an order directing the commission to grant Taylor a permit to chill beer for sale for off premises consumption only. On its appeal to the supreme court, the commission argued that the lower court had no authority to issue such an order since the commission could not lawfully grant a conditional license.[13] The commission claimed that it had the authority to issue only two types of permits—an unconditional one and a restricted one "for the sale of beer for consumption off the premises of the retailer."[14] Pursant to its legislative authority,[15] the commission had promulgated rules governing the issuance of retail licenses and had provided:

> Retail dealers who are holders of permits to sell beer for consumption off of the premises are hereby prohibited from having chilled beer on the premises of their establishment.
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> A violation of the foregoing shall be grounds for the suspension or revocation of any such permit.[16]

Consequently, the commission maintained that a permit for the sale of chilled beer was a hybrid permit not authorized by statute or regulation. The hybrid permit was less than an unconditional

(5) two churches were located in the area; (6) the property values in the area would drop; (7) the area was without adequate police protection; and (8) the front yards of some of the witnesses had been littered with beer cans thrown by passing motorists.

13. The commission had raised this same issue in *Fowler* but the court never reached its merits since Fowler's business location was found to be unsuitable. In *Taylor* the court likewise did not consider the issue because the Commission had not raised it at any stage of the prior proceedings and the issue was not deemed properly before the court.

14. S.C. CODE ANN. § 4-211 (Cum. Supp. 1973). *See* n. 1 *supra.*

15. *Id.* § 4-27.6 provides:

> The South Carolina Alcoholic Beverage Control Commission is authorized to issue such rules and regulations as may be necessary to carry out the duties imposed upon the Commission by law which, when duly promulgated, shall have the full force of law.

16. S.C. CODE ANN. A.B.C. Comm'n B.W. Reg. No. 20 (Cum. Supp. 1973). The Tax

authorization to sell beer at retail, but more than a permit to sell hot beer for off premises consumption only. The commission concluded that "neither the Commission nor the court below had the power to impose upon the license sought any restriction, limitation or condition, be it agreed to or not by the applicant, and such would be nugatory."[17]

Clearly, the issuance of a permit for the retail sale of chilled beer for off premises consumption is a hybrid permit which has qualities of both an unconditional permit and a restricted permit for the sale of *hot* beer for off premises consumption. The commission's argument in its brief is of special significance because the commission freely admits having issued hundreds of these hybrid permits,[18] frequently granting them in the form of unconditional permits with the applicant's voluntary stipulation that the chilled beer will be sold only for off premises consumption.[19] The commission has also maintained that its past willingness to consider and issue such hybrid permits with voluntary stipulations cannot supersede the statutes and its own regulations.[20] In short, the commission claimed that it has granted permits for the sale of chilled beer for off premises consumption which were beyond its power and authority to issue.

The commission's argument that a hybrid permit violates the statutory provisions and its own regulations is unfounded. The legislature has explicitly provided for only two types of retail beer and wine licenses.[21] One type of permit costs forty dollars and carries no specific restrictions; the other type of permit costs

Commission promulgated an identical regulation when it was authorized to issue retail beer permits prior to the creation of the South Carolina Alcoholic Beverage Control Commission. Since the new regulation was made close to the time of agency formation, when the statute was re-enacted to create the A.B.C. Commission, the regulation carries a strong presumption that it is based upon legislative intent. Consequently, a court in reviewing the regulation would be hesitant to substitute its own determination of legislative intent for that supplied by the commission. *See generally* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

17. Brief for Appellant at 10, Taylor v. Lewis, 261 S.C. 168, 198 S.E.2d 801 (1973).

18. *See* Brief for Respondent at 3, Taylor v. Lewis, 261 S.C. 168, 198 S.E.2d 801 (1973); *accord*, Brief for Appellant at 10.

19. In *Taylor* an application for an unconditional permit which would allow on premises consumption was rejected, but the commission allowed Taylor to submit the present application with such a voluntary stipulation and considered that application in a routine fashion rather than rejecting it out of hand as beyond its power to grant.

20. Brief for Appellant at 10, Taylor v. Lewis, 261 S.C. 168, 198 S.E.2d 801 (1973).

21. S.C. CODE ANN. § 4-211 (Cum. Supp. 1973). *See* note 1 *supra*.

five dollars and allows the sale of beer for consumption off the premises of the retailer.[22] The commission's regulation prohibiting possession of chilled beer under a retail permit to sell beer for consumption off the premises applies only to the *five* dollar permit.[23] Pursuant to its legislative authority to promulgate rules and regulations which have the force of law,[24] the commission has approved the use of voluntary stipulations:

> Any stipulation and/or agreement which is voluntarily entered into by an applicant in writing for a beer and wine permit between the applicant and the South Carolina Alcoholic Beverage Control Commission, if accepted by the Commission, will be incorporated into the basic requirements for the enjoyment and privilege of obtaining and retaining the beer and wine permit and which shall have the same effect as any and all laws and any and all other regulations pertaining to the effective administration of beer and wine permits and permittees.
>
> In the event that evidence is presented to this Commission that any part of the stipulation or agreement is or has been knowingly broken by the permittee will be a violation against the permit and shall constitute sufficient grounds to suspend or revoke said beer and wine permit [sic].[25]

Since this regulation does not conflict with the commission's statutory authority[26] and the commission has already issued hundreds of unconditional permits with voluntary stipulations,[27] the commission's position is without merit.

II. SOCIAL SECURITY ADMINISTRATION

Under the Social Security Act[28] claimants for disability benefits must prove disability to the satisfaction of the Secretary of

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22. *Id.*

23. *See* Brief for Appellant at 5, Taylor v. Lewis, 261 S.C. 168, 198 S.E.2d 801 (1973). *Compare* S.C. CODE ANN. § 4-211 (Cum. Supp. 1973) *with* S.C. CODE ANN. A.B.C. Comm'n B.W. Reg. No. 20 (Cum. Supp. 1973).

24. S.C. CODE ANN. § 4-27.6 (Cum. Supp. 1973). *See* n. 15, *supra.*

25. S.C. CODE ANN. A.B.C. Comm'n B.W. Reg. No. 31 (Cum. Supp. 1973).

26. S.C. CODE ANN. § 4-211 (Cum. Supp. 1973) does not expressly prohibit the use of voluntary stipulations. Moreover, the broad legislative grant of authority given to the commission in S.C. CODE ANN. § 4-27.6 evinces legislative recognition that restrictions on "unconditional" permits are, by the peculiar nature of beer and wine consumption control, not only necessary but desirable. Brief for Respondent at 3-4, Fowler v. Lewis, 260 S.C. 54, 194 S.E.2d 191 (1973).

27. *See* note 18 *supra* and accompanying text.

28. 42 U.S.C. §§ 301 et seq. (1962).

Health, Education and Welfare under a two-fold test. There must be both a showing of a medically determinable physical or mental impairment and the impairment must be such as to render the claimant unable to engage in substantial gainful employment.[29] In reviewing decisions of the Secretary, the scope of judicial review by the federal courts is narrow; "the findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."[30] Courts, however, will not accept the Secretary's findings blindly. A claimant's statutory right of review[31] contemplates more than an uncritical rubber stamping of administrative action. A critical and searching examination of the record should be made and the Secretary's decision set aside when necessary to insure a result consistent with congressional intent and elemental fairness.[32]

Despite harsh congressional criticism of some federal decisions affirming the findings of the Secretary,[33] the courts have been increasingly critical of administrative findings in recent cases. In *Black v. Richardson*[34] claimant's application for disability benefits was denied by the Secretary. Claimant, a forty-four year old textile worker with only six years of education, had contracted bronchiectasis which ultimately led to the surgical removal of one-third of her lung tissue. At the administrative hearing, the claimant submitted the report of an examining physician

29. Harris v. Richardson, 450 F.2d 1099 (4th Cir. 1971).

30. 42 U.S.C. § 405(g) (1972). *See e.g.,* Orr v. Gardner, 261 F. Supp. 39 (D.S.C. 1966). The phrase "substantial evidence" has been defined in Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966), to mean:

> . . . evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is "substantial evidence."

31. 42 U.S.C. § 405(g)(1970).

32. Flack v. Cohen, 413 F.2d 278 (4th Cir. 1969).

33. *See* Floyd v. Finch, 441 F.2d 73, (6th Cir. 1971); *accord,* Garrett v. Richardson, 471 F.2d 598 (8th Cir. 1972). In *Floyd* the court noted:

> It used to be easy enough for an appellate court to affirm an administrative agency on the ground that the findings were supported "by substantial evidence," if it could find just a trace of evidence to support them. But that is not the case anymore. Congress grew critical of such affirmances which ignored conflicting evidence and, in turn, brought about harsh criticism of the courts for such decisions on the ground that cases were affirmed merely because the appellate court could find evidence in the record which, viewed in isolation, substantiated a Board's findings.

441 F.2d at 76.

34. 356 F. Supp. 861 (D.S.C. 1973).

who had conducted certain tests to determine claimant's lung capacity.[35] The physician's report contained neither an evaluation of the test results nor comments upon their significance. Since hearing examiners are normally laymen, the courts have allowed the use of independent, neutral medical advisers to explain complex medical problems in terms understandable to the layman-examiner. Medical advisers who are usually board certified specialists and who are paid a fee by the government are used in approximately thirteen percent of all disability hearings. While these advisers may offer opinions, they must also be neutral in their attitude.[36] In *Black* the hearing examiner's medical adviser interpreted the results of the pulmonary function studies at the hearing, but repeatedly expressed surprise over what he termed "illogical" results. In so doing, the court voiced doubts as to whether the medical adviser was giving advice or testifying.

In view of the questionable test results and the hearing examiner's obvious reliance upon them, the court was unable to determine, as a matter of law, if the Secretary's findings were supported by substantial evidence and remanded the case for further proceedings. In *Black*, the court was highly critical of the conduct of the hearing and so stated in no uncertain terms:

> This court could not help but note with some concern the manner in which the hearing in this case was conducted. From the record it appears that every effort was made to accommodate the hearing examiner's medical . . . adviser's time schedules to the total disregard and disruption of the plaintiff's testimony. While it is understandable that professional men have busy schedules and command high fees for their time, it must not be forgotten that taxpayers and claimants too are entitled to consideration by the government which exists to serve *them*. . . . [T]he district courts are already overburdened with cases without having to correct every examiner's decision for the misuse or complete disregard of correct standards in cases such as this.[37]

The critical tone of federal decisions continued in *Byrd v.*

35. The test was a Respiratory Functions Study using the Air-Shields Pulmonary Function Recorder which records test results in the form of a graph. These graphs were attached to the report introduced into evidence.

36. Richardson v. Perales, 402 U.S. 389 (1971) (Douglas, J., dissenting). The use of medical advisers was strongly criticized by Mr. Justice Douglas who stated, "The use by HEW of its stable of defense doctors without submitting them to cross examination is the cutting of corners—a practice in which certainly the Government should not indulge." *Id.* at 414.

37. 356 F. Supp. at 872. *But see* Blalock v. Richardson, 483 F.2d 773 (4th Cir. 1972),

Richardson[38] where the court again chastised the hearing examiner. The claimant, who suffered an arthritic condition of the spine and hands, alleged that she was unable to return to her previous employment and was totally disabled. The hearing examiner relied upon one medical report which described claimant's condition as minimal. He concluded that the claimant did experience some discomfort but was not totally disabled by her condition and could perform light or sedentary work duties.[39] In reviewing the record, the district court noticed that another medical report directly conflicted with both the examiner's conclusions and the first medical report. Moreover, the court expressed concern that the record contained references to other medical reports which could resolve the conflict but which the examiner made no effort to include in the record. In remanding to the Secretary for the purpose of obtaining and considering these other records, the court observed:

> It is clear that the initial burden is upon the plaintiff to prove that he is disabled under the Act . . . and that a part of this burden is to produce for consideration adequate medical evidence to support the claimed disability. A countervailing consideration however is the duty of impartiality and basic fairness which is imposed on the hearing examiner. The hearing examiner is not the secretary's advocate, but is given authority as an impartial trier of fact. . . . This court is of the opinion however that, as the hearing examiner had knowledge from reports before him of other medical reports bearing directly on the alleged impairment, he should have specifically requested the subject records.[40]

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where the court set aside the lower court's judgment that the Secretary's findings were unsupported by substantial evidence. In *Blalock,* claimant argued that she became disabled prior to 1964 when she last met the eligibility requirements. Although some evidence existed to show that claimant suffered arthritis, a severe neurosis, and an inadequate personality, the hearing examiner was justified in relying upon his medical adviser who interpreted the evidence as showing that claimant had a gradual and progressive illness but that it had not reached a disabling stage prior to the expiration of her insured status.

38. 362 F. Supp. 957 (D.S.C. 1973).

39. 42 U.S.C. § 423(d)(2)(A) (1972) provides:

> . . . an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

40. 362 F. Supp. at 963. In Garrett v. Richardson, 363 F. Supp. 83 (D.S.C. 1973) the court reviewed a record substantially similar to the one in *Byrd* with subsequent identical

It would appear that the courts are no longer willing to approve the Secretary of Health, Education and Welfare's decisions without being convinced that findings are, on the whole record, based upon substantial evidence. Indeed, the courts appear willing to remand or reverse such decisions more than ever before.[41] A critical approach by the courts, moreover, comports with the basic premise of the Social Security Act and is more amenable to a liberal construction of the Act in favor of claimants.

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results. In *Garrett*, the examiner was criticized in several respects. First, the examiner's failure to obtain two medical reports for the record was found not to comport with a full, fair, and impartial development of the facts. Second, the examiner's decision that the claimant could perform light work was unsupported speculation in the absence of testimony by a vocational expert. Despite the ability of the examiner to take administrative notice of the existence of light and sedentary work in the national economy, the record reflected no testimony indicating the claimant could perform such work.

41. The critical trend of court decisions does not seem to be restricted to disability hearings. In Delk v. Richardson, 365 F. Supp. 627 (D.S.C. 1973), the court reversed the Secretary's decision denying payment of benefits for in-patient services under the medicare program. Although the claimant had not been treated in a hospital which was eligible for program payments, her admission to a nonparticipating hospital, which was the only available hospital equipped to treat multiple facial fractures, was necessary to prevent serious impairment to her health. The court noted that the only other hospital which could treat such injuries under the medicare program was the Medical College of Charleston Hospital which takes patients only on a selective basis.