Administrative Law

David M. Guinn

ADMINISTRATIVE LAW

by

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THE survey period once again produced a large volume of administrative law decisions, and the majority of these dealt with well-established principles that do not merit reiteration. Those of major significance fall within the three primary areas discussed in previous *Surveys*:[1] constitutional considerations, administrative adjudication, and the various subheadings under judicial review—statutory interpretation, substantial evidence, jurisdictional facts, and the validity of administrative rules.

I. CONSTITUTIONAL CONSIDERATIONS

One of the few supreme court decisions during the past year to deal strictly with an administrative law problem concerned the constitutionality of certain revisions to the Texas barber law.[2]

Texas State Board of Barber Examiners v. Beaumont Barber College, Inc.[3] was an appeal from an order of the Board revoking a permit to operate the college. The original permit was issued on August 28, 1959, and the law in effect at that time did not specify the square footage requisite for such an establishment.[4] However, the 1961 amendments to the Texas barber law specifically required that all barber colleges that issue "Class-A" permits have a minimum floor space of 2,800 square feet.[5] The Beaumont Barber College had only 1,000 square feet.

The college attacked the statute as an unreasonable exercise of the police power, and the trial court ruled in favor of the Board. However, the Austin court of civil appeals reversed,[6] holding that the 1961 revisions were arbitrary, unnecessary, unreasonable, and had no relationship to the public health or welfare.

On appeal, the supreme court was presented with two principal issues: (1) whether the law was retroactive in violation of article I, section 16 of the Texas Constitution,[7] and (2) whether the statute was a reasonable exercise of the police power. A unanimous court concluded that the legislature intended the new provisions to apply to all barber colleges, including those then in existence. Even though the Beaumont Barber College issued permits under the old law, it did not thereby obtain a constitutionally-

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[1] *See* FitzGerald, *Administrative Law, Annual Survey of Texas Law*, 23 Sw. L.J. 212 (1969); Guinn, *Administrative Law, Annual Survey of Texas Law*, 24 Sw. L.J. 216 (1970).

[2] TEX. PEN. CODE ANN. art. 734(a) (1970), *amending id.* art. 734(a) (1961).

[3] 454 S.W.2d 729 (Tex. 1970).

[4] TEX. PEN. CODE ANN. art. 734(a), § 9 (1929).

[5] *Id.* art. 734(a), § 9(c) (1970).

[6] Beaumont Barber College, Inc. v. Texas State Bd. of Barber Examiners, 448 S.W.2d 498 (Tex. Civ. App.—Austin 1970).

[7] TEX. CONST. art. I, § 16, provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

protected, vested right of immunity from further or different statutory regulation. The change may have had a retroactive effect, but it was not unreasonable.

Concerning the question of reasonable utilization of the police power, the court concluded that it could not declare that the floor space requirement bore no reasonable relationship to the public health, comfort, safety, or welfare. "There may be differences of opinion concerning the necessity or desirability of the regulations under review but this does not afford a sufficient basis for the courts to strike down the legislation as arbitrary or unreasonable."[8]

II. ADMINISTRATIVE ADJUDICATION

In *Johnson v. Texas Board of Chiropractic Examiners*[9] the Amarillo court of civil appeals recently held that the time in which a chiropractor had to appeal a license revocation is to be computed from the date the order of revocation is made public, and not from the date of actual rendition.

Johnson was charged with violating rule 13 of the rules and regulations promulgated by the Board of Chiropractic Examiners.[10] On March 20, 1969, a hearing was held upon the charges. No decision was announced by the Board. Instead, on April 7, 1969, the Board mailed to Johnson its order dated March 20, 1969, suspending his license to practice. This letter was received by the licensee on April 9, 1969, which was the twentieth day from the date of the order. On April 23, 1969, sixteen days after the mailing of the order and fourteen days after actual receipt thereof, Johnson perfected his appeal to an appropriate district court.

The trial court sustained the Board's jurisdictional plea predicated upon article 4512(b), section 14, which provides that a licensee must perfect his appeal from a Board ruling "within twenty (20) days after the making and entering of such order."[11] However, the appellate court concluded that the legislature intended the twenty-day period to begin to run on the date the order was issued, released, or otherwise published or made public. This occurred when the Board posted a letter and copy of the decision in the mail on April 7, 1969. The court was careful to make clear that they were not to be understood as holding that actual notice had to be received by the licensee. The court concluded: "We . . . hold that the 20-day period to take an appeal in which the party whose license to practice chiropractic has been cancelled, revoked or suspended does not begin to run until the order is made available to that party . . . ."[12]

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[8] 454 S.W.2d at 733.

[9] 449 S.W.2d 145 (Tex. Civ. App.—Amarillo 1969).

[10] RULES AND REGULATIONS OF THE TEXAS BOARD OF CHIROPRACTIC EXAMINERS rule 13 (1957) provides: "Under the provisions of paragraphs 5, 6 and 8 of Section 14a, the Board rules that it shall be considered unprofessional conduct for a licensee: . . . 13. To advertise fees for service, 'Free Examination,' 'No Charge for Consultation,' or other like phrases or words."

[11] TEX. REV. CIV. STAT. ANN. art. 4512(b), § 14 (1966).

[12] 449 S.W.2d at 148.

III. JUDICIAL REVIEW

Statutory Interpretation. The survey period produced three interesting cases involving statutory interpretation. Although this is clearly a question of law upon which the courts may properly substitute their judgment for that of the agencies,[13] in two of the three decisions the appellate courts, placing considerable emphasis upon agency analysis,[14] affirmed the finding of those agencies.

In *Texas Employment Commission v. Kirkland*[15] the El Paso court of appeals ruled, in accord with the Texas Employment Commission, that an individual who limited his offer to work for one week was not "available for work" within the meaning of the Unemployment Compensation Act.[16]

Kirkland, a retired Army enlisted man, registered for work at an employment office and reported to that office each week during the fourteen weeks for which he claimed benefits. At the time of initial registration, he advised the Commission that he had applied for on-the-job training as a dental technician through a program sponsored by the Veterans Administration. He further advised it that his eligibility for that program would be established quickly, possibly within one to two weeks, and, therefore, his "availability for work" applied only to that period of time. The Commission denied compensation. However, upon appeal to the appropriate county court, this determination was reversed. The Commission appealed the reversal, and the court of civil appeals ruled that the claimant's limiting his availability for work to one week effectively detached him from the labor market.[17]

In a second instance of statutory interpretation, a Houston court of civil appeals held that under the Fireman's and Policeman's Civil Service Act,[18] an applicant would not be eligible for a promotion unless he had at least two years of *continuous, uninterrupted* service immediately preceding the promotional exam.[19]

The Fireman's and Policeman's Civil Service Commission of Houston

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[13] *See* 2 F. COOPER, STATE ADMINISTRATIVE LAW 665-67, 706-22 (1965).

[14] This is somewhat of a departure from last year's results. *See* Guinn, *Administrative Law, Annual Survey of Texas Law*, 24 Sw. L.J. 216, 220-21 (1970).

[15] 445 S.W.2d 777 (Tex. Civ. App.—El Paso 1969).

[16] TEX. REV. CIV. STAT. ANN. art. 5221b-2 (1971) provides in part:

> An unemployed individual shall be eligible to receive benefits with respect to any benefit period only if the Commission finds that:
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> (a) He has registered for work at, and thereafter has continued to report at, an employment office in accordance with such regulations as the Commission may prescribe;
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> (b) He has made a claim for benefits in accordance with the provisions of [art. 5221b-3];
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> (c) He is able to work;
>
> (d) He is available for work . . . .

[17] In relation to a second point raised in the case, the court concluded that there was substantial evidence to support the Commission's ruling that Kirkland had not made a reasonable, diligent search for work in his locality. *See* Texas Employment Comm'n v. Holberg, 440 S.W.2d 38 (Tex. 1969), discussed in Guinn, *Administrative Law, Annual Survey of Texas Law*, 24 Sw. L.J. 216, 225 n.42 (1970).

[18] TEX. REV. CIV. STAT. ANN. art. 1269m (1963).

[19] City of Houston v. Landrum, 448 S.W.2d 816 (Tex. Civ. App.—Houston 1970), *error ref. n.r.e.*

scheduled a promotional exam for the position of chauffeur in the Houston fire department. Landrum made application to take the test but was refused by the Commission on the grounds that he had not been employed by the fire department continually for two years immediately preceding the date of the exam, as required by article 1269m, section 14.[20] The district court reversed and the Commission appealed.

The applicant's employment record with the fire department was rather extensive, though sporadic. The record indicated that from August 16, 1949, to October 25, 1968, he had been employed no less than four times. The last date of reinstatement fell on October 25, 1968, slightly less than eight months prior to the date set for the examination.

The appellate court, in upholding the Commission's interpretation of article 1269m, section 14, ruled that a reading of that section indicated a legislative intent and purpose to promote only those with at least two years of continuous service *immediately preceding* a promotional exam. Further, the court held that the phrase "held a continuous position for two years"[21] connotes holding a position for such period without interruption.

In the only case in which the court disagreed with the agency interpretation, the Fort Worth court of civil appeals recently concluded that the Board of Dental Examiners was without statutory authority to enact its Telephone-Directory-Listings Rules and Regulations. In *Texas State Board of Dental Examiners v. Prichard*[22] the license of Dr. Prichard was suspended for listing his name in the telephone directory under a separate limitation of practice, as prohibited by the Board's regulations.[23] The sus-

[20] TEX. REV. CIV. STAT. ANN. art. 1269m, §§ 14(A), (D) (1947), provides:

> (A) All promotional examinations shall be open to all policemen and firemen who have held a continuous position for two (2) years or more in the classification immediately below in salary of that classification for which the examination is to be held;
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> . . . .
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> (D) . . . [n]o person shall be eligible for promotion unless he has served in such Department for at least two (2) years immediately preceding the day of such promotional examination in the next lower position or other positions specified by the Commission.

[21] *Id.*

[22] 446 S.W.2d 905 (Tex. Civ. App.—Fort Worth 1969), *error ref. n.r.e.*

[23] RULES AND REGULATIONS OF THE TEXAS STATE BOARD OF DENTAL EXAMINERS rule IV-4 (1961) (emphasis added):

> (a) A dental licensee may not have more than two professional listings such as are usually contained in a telephone book, one in the 'white' and one in the 'yellow' section, and such listing shall be in regularly used small size type and not be printed in large or bold face type, or be multi-colored, or set in a border of any kind. Such listings may contain only the name, the dental degree or degrees conferred on such licensee, the address and the telephone numbers of the practitioner at such address. Where a practitioner limits his practice to one specialty he may add, immediately following his alphabetical listing, such limitation of practice or specialty as provided in these rules. *A practitioner shall not list or permit the listing of his name or address under any separate limitation of practice or specialty heading or at any address at which he is not practicing.*
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> . . . .
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> (c) It shall be the duty of each dentist who practices or has practiced at any location to advise the telephone company of any change in his status or location sufficiently in advance to prohibit erroneous or misleading information to be published and to conform with these rules.

In 1967, when the complaint in question was filed, Dr. Prichard was listed in the yellow pages of the telephone directory under his specialty as follows:

pension was appealed to the district court, where, after a full hearing, the order of suspension was revoked. The Board appealed, contending that the order was not shown to be arbitrary, illegal, or void, and was reasonably supported by substantial evidence. The doctor's sole contention was that the rules were void because the agency lacked statutory authority to enact them.

The rule-making power of the Board is governed by two separate statutory provisions. Article 4543[24] of the civil statutes authorizes the Board to enact any rule governing its own proceedings and the examination of applicants. Article 4551(d)[25] permits the Board to adopt rules to carry out the provisions of the Dental Practice Act,[26] as long as the regulations are not inconsistent with that Act.

The court of appeals, after a thorough analysis of the above-mentioned provisions and all other dental statutes, concluded that revocation of a license could not be predicated upon acts or conduct not specifically prohibited by statute or clearly embraced within their terms. The court further concluded that the only punishable offenses under the dental statutes were those which a majority of the legislature had passed upon, and that the statutes in question did not authorize the Board to promulgate by rule additional punishable offenses which were unrelated and inconsistent with the statutes.

According to Professor Davis,[27] when the validity of a legislative rule is in issue, the reviewing court has no authority to substitute its judgment for that of the agencies as to the content of the rule, for the legislative body has placed the authority in the agency and not in the court. In reviewing the validity of such a rule, the scope of judicial review is limited to three issues: (1) whether the rule is within the power granted, (2) whether it was issued pursuant to proper procedure, and (3) whether it is reasonable.[28] The *Prichard* decision is a classic example of an attack upon the validity of an agency rule predicated upon a lack of statutory authority.

One cannot help wondering about the value of the *Prichard* case as precedent, even though the Texas supreme court found no reversible error. The court of appeals emphasized the distinguished qualifications of Dr. Prichard[29] and the exceedingly harsh remedy of suspension for such a

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Dentists—Periodontists (Gum Diseases)
Prichard, John F.
Business Address—phone number
Residence Address—phone number

446 S.W.2d at 907. He had listed his name and specialty exactly the same way since 1947, when he was certified as a specialist in periodontics. *Id.*

[24] TEX. REV. CIV. STAT. ANN. art. 4543 (1960).

[25] *Id.* art. 4551d (1960).

[26] *Id.* arts. 4543-51f (1960).

[27] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958).

[28] *Id.*

[29] Concerning Dr. Prichard's qualifications, the court stated:

> Appellee . . . has been licensed . . . to practice dentistry continuously since 1928, the same year he received his D.D.S. degree from Baylor at Dallas. He is a doctor of dental surgery. His practice is limited to periodontics. He has had numerous post graduate courses in periodontics at such institutions as Boston University, Beth Israel Hospital in Boston, Northwestern University, and the University of Michi-

relatively insignificant violation not involving unprofessional conduct. To support the Board's promulgation of the rules, it certainly appears that there is just as much statutory authority under the dental statutes as exists under the Optometry Act,[30] and the Board rules in the latter case were upheld by the supreme court in *Texas State Board of Examiners in Optometry v. Carp*.[31]

The Substantial Evidence Rule. In May 1970, the supreme court, in applying the Texas substantial evidence rule, reversed a lower court determination to the effect that an order of the Texas Aeronautics Commission was not reasonably supported by substantial evidence.[32] The court of appeals decision was discussed at length in last year's *Survey*, and it was suggested at that time that the court had apparently misconstrued the functions of the substantial evidence test.[33]

Air Southwest had made an application to the Commission for a Certificate of Public Convenience and Necessity to operate a scheduled commuter service between Dallas-Fort Worth, San Antonio and Houston. Braniff Airways, Continental Airlines, and Trans-Texas Airways (TTA) intervened and contested the application. At the conclusion of the hearing, the Board issued an order granting the application. The intervenors brought suit in the district court, where the order was set aside. The Austin court of appeals agreed with the district court that the order was not reasonably supported by substantial evidence. While the court recognized that the evidence in behalf of the appellant comprised "a substantial part of this record,"[34] it did not deem that controlling in light of the fact that the testimony of several witnesses was "too vague and general to formulate evidence of a nature substantial enough to cast any doubt whatsoever on the adequacy of service presented through the testimony of the [intervenors]."[35]

Before the supreme court, Braniff, Continental, and TTA contended that the court need only examine the present services afforded by them to

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gan. He is a past-president of the American Society of Periodontics, a Diplomate of the American Board of Periodontology. The latter was the result of a National Board examination in 1947, at which time he was certified as a specialist in periodontics. He is a member of the American Dental Association, the American Academy of Oral Roentgenology, the State and District Dental Associations, and of numerous other professional societies.

He is the author of a 600 page published textbook on advanced periodontal disease which is in general use with practically all graduate courses and a number of undergraduate dental schools.

He is a Senior Consultant of the Periodontics Department of the University of Washington in Seattle, a visiting lecturer in the Periodontics Department of the University of Pennsylvania. He has been active with and is now Honorary Consultant to the United States Public Health Service through the Air Force at Lackland, Carswell, and the United States Public Health Hospital in Fort Worth.

446 S.W.2d at 907.

[30] TEX. REV. CIV. STAT. ANN. arts. 4552-56 (1960).

[31] 412 S.W.2d 307 (Tex. 1967).

[32] Texas Aeronautics Comm'n v. Braniff Airways, Inc., 454 S.W.2d 199 (Tex. 1970).

[33] Guinn, *Administrative Law, Annual Survey of Texas Law*, 24 Sw. L.J. 216, 226 (1970).

[34] Texas Aeronautics Comm'n v. Braniff Airways, 439 S.W.2d 699, 705 (Tex. Civ. App.—Austin 1969).

[35] *Id.* at 711.

these cities and, upon finding those services adequate, conclude the case in their favor. The court first observed that the statute in question did not specifically require the Commission to determine that existing services were inadequate prior to granting a new certificate.[36] However, the court noted that whether named or not, adequacy of existing service is always an important consideration in determining public need for additional service. This does not mean, however, that adequacy should be taken to denote bare sufficiency. The existing air service, for example, could be inadequate even though anyone with a fare is presently able to obtain passage. The court then concluded that based upon the record they could not say that a decision *either granting or denying* the application would be unsupported by substantial evidence.[37]

The survey period produced the first reported case under the 1967 revisions to the Medical Practice Act,[38] which now provides that medical license revocations are subject to substantial evidence review.[39]

In *Korndorffer v. Texas State Board of Medical Examiners*[40] a physician was charged with having in his possession during a period of time from November 1, 1966, to December 13, 1967, 1,598 demerol tablets and 872 codeine tablets, and that his records did not disclose the name or names of the persons to whom these drugs were dispersed. The Board alleged that the doctor's failure to keep such records constituted a violation of article 4506.[41] After a hearing before the Board, the doctor's license was revoked, whereupon he appealed to the district court which upheld the order of revocation.

Appellant was a licensed physician specializing in pathology. He did not regularly treat private patients and was not engaged in the private practice of medicine. He testified that he had administered to himself four tablets of demerol every four hours for a period of three months. He further testified that he had dispensed an unspecified amount of demerol and codeine to his wife and two older children, on the advice of their respective physicians. Korndorffer also related that he kept no formal rec-

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[36] TEX. REV. CIV. STAT. ANN. art. 46C-6, subdivision 3 (1969) provides in part:

> As to the economic regulations promulgated, the Commission shall take into account the financial responsibility of the carrier, the public convenience and necessity for the proposed service, routes, proposed rates or charges, the effect on existing carriers, and any other factors bearing a relation thereto and pertaining to the public interest and necessity.

[37] The most pertinent portions of the record considered by the court were: (1) the poor performance record of existing carriers, (2) the admissibility of a survey of public attitude toward the proposed system, prepared by Air Southwest, and (3) the proposal itself. 454 S.W.2d at 202-04.

[38] TEX. REV. CIV. STAT. ANN. arts. 4495-512 (1970).

[39] *Id.* art. 4506 provides in part: "Any person whose license to practice medicine has been cancelled, revoked or suspended by the Board may, within twenty (20) days after the making and entering of such order, take an appeal to any of the district courts in the county of his residence . . . . The proceeding on appeal shall be under the substantial evidence rule . . . ."

[40] 448 S.W.2d 819 (Tex. Civ. App.—Houston 1969), *error granted.*

[41] TEX. REV. CIV. STAT. ANN. art. 4506 (1966), *as amended, id.* § 4506 (1970), provides: "The Texas State Board of Medical Examiners shall have the right to . . . suspend the license of any practitioner . . . for any cause for which the Board shall be authorized to refuse to admit persons to its examination, as provided in Article 4505 . . . ." In *Korndorffer* the Board relied upon the cause enumerated in TEX. REV. CIV. STAT. ANN. art. 4505, § 4 (1966): "Grossly unprofessional or dishonorable conduct [of] a character which in the opinion of the Board is likely to deceive or defraud the public."

ords of the drugs dispensed by him, but he did have records of invoices, orders, and payments, and, therefore, the number of tablets on hand was ascertainable. An agent of the Federal Bureau of Narcotics testified that he checked the narcotic records and drugs of the appellant and determined that there was a shortage of 1,598 tablets of demerol and 872 of codeine. Further, the shortage occurred sometime between November 1, 1966, and December 13, 1967. The agent testified that he knew the quantity of narcotics the appellant ordered, how much the doctor had on hand, and how much he was supposed to have on hand.

The court of civil appeals, in remanding the case for further clarification of the record, concluded that the only proof against the doctor consisted of hearsay. The amount of narcotic drugs which he had ordered, which comprised the claimed shortage, was not proved by legal and competent evidence. Further, there was no proof of any kind of the reasonableness and propriety of appellant's dispensing of drugs, whether the quantities administered were to be considered small or large. Medical testimony was required for a proper determination of this issue. In any event, the court believed the record to be "incomplete,"[42] and that even though the order of the Board was not reasonably supported by substantial evidence, the record should be more fully developed.

The case is interesting for several reasons. First, without hesitation, the court approved the amendment to article 4506, and conceded that while de novo review had been the previous rule in medical revocation, substantial evidence now prevailed.[43] Secondly, the court appears to be relying upon something closely akin to the residuum rule[44] in requiring legally competent evidence to support the order. Thirdly, the requisite of expert medical testimony is nothing more than a reiteration of a supreme court principle established in *Scott v. State Board of Medical Examiners*.[45] Finally, the rather unique disposition of the case is somewhat puzzling. The court concluded that the order of the Board was not reasonably supported by substantial evidence, but that the record needed further clarification. If the order was not supported by substantial evidence, it is uncertain what the function of the remand might be.[46]

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[42] 448 S.W.2d at 824.

[43] De novo review of medical license revocations provided for in TEX. REV. CIV. STAT. ANN. art. 4506 (1929) was extensively discussed and upheld in the supreme court decision of Scott v. State Bd. of Medical Examiners, 384 S.W.2d 686 (Tex. 1964).

[44] "Under this rule it is said that a finding cannot be supported by substantial evidence unless at least a residuum of the supporting evidence would be competent under the exclusionary rules. For example, if the supporting evidence were all hearsay, it could not be deemed substantial." 1 F. COOPER, STATE ADMINISTRATIVE LAW 405 (1965). The merits of the same are fully discussed in 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 14.10-.12 (1958), and in 1 F. COOPER, STATE ADMINISTRATIVE LAW 404-12 (1965).

[45] 384 S.W.2d 686 (Tex. 1964).

[46] The Texas supreme court affirmed in part and reversed in part in Korndorffer v. Texas State Bd. of Medical Examiners, 13 Tex. Sup. Ct. J. 474 (1970). In an opinion written by Judge Pope, the court agreed with the court of appeals that the Board's order of revocation was not supported by substantial evidence, and that that portion of the court of appeals' decision reversing the trial court on this point should be affirmed. However, the part of the judgment which remanded the case to the trial court for further clarification of the record was reversed.

The supreme court specifically pointed out that the charge against the physician was that his failure to keep records was likely to *deceive* or *defraud* the public. *See* note 41 *supra*. The Board

Jurisdictional Facts. In what is probably the most unusual holding to be reported during the survey period, the Texarkana court of civil appeals ruled that a litigant is entitled to a jury trial on the jurisdictional issue of notice in a forced pooling case under article 6008c.[47]

T. E. Coleman brought a suit for a permanent injunction against the Texas Railroad Commission. The action was designed to test the validity of an order of the Commission pooling all unpooled mineral interests underlying an eighty-acre proration unit previously formed by the Commission in the Simms Field in Bowie County, Texas.

In March 1955, Coleman leased his one-half undivided interest in the minerals of a 240-acre tract to one Boyd. In July 1962, Coleman divided the fee ownership of the land in the leased tract by deeding 182.66 acres to the Veterans Land Board. In turn, the Board conveyed the land to one Ashford. An assignee of the lease drilled a producing well on the leased land. The well site was on the part of the 240-acres leased tract retained by and belonging to Coleman. An order of the Commission forming an eighty-acre proration unit made up of 35.25 surface acres belonging to Coleman and 44.75 acres belonging to Ashford was secured by the well operator. After purchase, Ashford received delay rentals accruing under the Coleman-to-Boyd lease. After production, neither rentals nor a portion of production or its value were paid to Ashford. He petitioned the Railroad Commission to employ article 6008c,[48] and make an order pooling his royalty acreage in the production unit with that of Coleman. The application was granted and a forced pooling order issued approving Ashford's offer to Coleman of a forty-five per cent/fifty-five per cent division of royalty, with Coleman taking the larger percentage.

Coleman appealed to the district court and contended that the Railroad Commission did not have jurisdiction because he had never received the notice required by article 6008c.[49] He further contended that he should receive a jury trial on the issue of notice. The trial court considered Coleman's request for a jury, but determined that the case should be tried under the substantial evidence rule. The court then held that there was substantial evidence that Coleman had received the required notice, and upheld the Commission order.

The appellant's two principal contentions on appeal were that the Rail-

recognized the necessity of proving deceit or fraud upon the public and argued that TEX. PEN. CODE ANN. art. 725b, § 9 (1970) required physicians to keep a record of drugs received and of drugs administered other than by prescription. The above provision excused records in certain instances, and Dr. Korndorffer contended that he was not required to keep records in the instances charged.

The supreme court decided that the crux of the matter was that the physician was not charged with violating art. 725(b), and fraud or deceit upon the public are not elements of the statute. The court concluded: "The charge against him was that he deceived or defrauded the public by failing to keep records. We find no evidence that Dr. Korndorffer deceived or misled anyone." *Id.* at 475.

[47] Coleman v. Railroad Comm'n, 445 S.W.2d 790 (Tex. Civ. App.—Texarkana 1969), *error granted.*

[48] TEX. REV. CIV. STAT. ANN. art. 6008c (1970).

[49] The pertinent portion of TEX. REV. CIV. STAT. ANN. art. 6008c (1970) provides: "Upon the filing of an application for pooling of interests into a unit under this Act, at least 30 days notice shall be given to all interested parties . . . in the manner and form prescribed by the Commission before hearing on such application . . . ."

road Commission had never acquired jurisdiction of the subject matter because the required notice had not been given, and that his request for a jury trial on the jurisdictional issue should have been granted. The appellate tribunal concluded that Coleman was entitled to a jury trial on the notice issue. The court reasoned that the trial court was under a duty to exercise its independent judgment and determine from a preponderance of the evidence ultimate fact issues relevant to jurisdiction. Also, the court concluded that both the Commission and Ashford had failed to draw a distinction between "jurisdictional facts" and "administrative facts" that the Commission might be required to determine in the execution of its administrative functions. In short, jurisdictional fact issues were judicial in nature and the courts must determine them by a preponderance of the evidence.[50]

The author does not recall a Texas case in which a similar result was reached concerning jurisdictional facts. The *Coleman* case appears to emit shades and phases of the old *Crowell v. Benson*[51] jurisdictional fact theory, in which the United States Supreme Court ruled that de novo review of an administrative fact determination was required where "jurisdictional fact" issues were involved.[52] Most leading authorities in the area of administrative law have asserted that the doctrine has been substantially rejected by later Supreme Court holdings and that the vast majority of state courts have also refused to adhere to the concept.[53]

Rule Making: Validity. The Texas supreme court, in a 1970 decision,[54] upheld the validity of the Texas Liquor Control Board's (now the Texas

[50] In Railroad Comm'n v. Coleman, 460 S.W.2d 404 (Tex. 1970), the supreme court affirmed the court of appeals decision on an entirely different basis and specifically refused to determine whether the litigant was entitled to a jury trial on the notice issue.

[51] 285 U.S. 22 (1932).

[52] The Supreme Court stated in *Benson*: "A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme." *Id.* at 54-55. The Court noted that in situations involving constitutional rights, the judicial power of the United States extended to independent determinations of both factual and legal questions. The Court concluded that the "essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it." *Id.* at 64.

[53] For an excellent discussion of the jurisdictional-fact doctrine, see 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.08 (1958). Professor Davis concludes that "*Crowell v. Benson* is one of the celebrated cases in the development of administrative law, although its doctrine is probably no longer the law." *Id.* at 156. *See also* 2 F. COOPER, STATE ADMINISTRATIVE LAW 675-76 (1965). In relation to the application of the jurisdictional-fact doctrine in state courts, Professor Cooper observes:

> The question whether the doctrine of *Crowell v. Benson* will be followed in the state courts arises principally in workmen's compensation cases, where the question of the existence of the employer-employee relationship (one of the precise issues described as "jurisdictional facts" in *Crowell v. Benson*) can be viewed as a critical question of fact on which depends the jurisdiction of the commission to make an award of compensation.
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> A few state courts have followed *Crowell v. Benson*; but most state courts, not conceiving themselves bound to follow it as a matter of due process, have declined to apply the doctrine in reviewing administrative determinations as to the existence of the employer-employee relationship in workmen's compensation and other like cases, and have been content to affirm the administrative finding of fact if it is supported by evidence.

Id. at 157.

[54] Texas Liquor Control Bd. v. The Attic Club, Inc., 457 S.W.2d 41 (Tex. 1970).

Alcoholic Beverage Commission) rule 56,[55] governing the procedural operation for membership in private clubs licensed under the Texas Liquor Control Act.[56]

The rule became effective on September 1, 1969, and, shortly thereafter, two private clubs registered under the Texas Liquor Control Act brought suit to restrain enforcement of the rule. The request for a temporary restraining order was denied by the trial court and the clubs appealed. Before the court of appeals, the appellants contended that the rule was void in toto because the proper procedures[57] had not been followed in enacting the rule and that sections 3(3) and 4 were too vague and indefinite.[58]

The court of appeals, in reversing the decision of the trial court, concluded that since findings of fact as required by article 666-7(a)[59] were not contained in the promulgating order, or in other records of the Board, the necessary findings of fact had not been made, and the rule was void in toto. The court further found that section 3(3) of the rule dealing with the definition of a "guest" and section 4 concerning "regular food service adequate for its members and guests,"[60] lent themselves to a wide variety of inconsistent interpretations and thus were void for vagueness.

The supreme court, in reversing the court of appeals, first concluded that article 666-7(a) did not require an order of the Board adopting rules in an exercise of its delegated powers to contain findings of fact; nor that findings of fact be otherwise reduced to writing. The statute stated only that the Board was empowered to act upon findings of fact. Hence, special or written findings were not declared to be a prerequisite to the validity of the order.

Concerning the definition of the terms "guest" and "regular food

[55] RULES AND REGULATIONS OF THE TEXAS LIQUOR CONTROL BOARD rule 56 (1969).

[56] TEX. PEN. CODE ANN. arts. 666-1 to 667-31 (1952).

[57] The specific procedural complaint related to the requirements of TEX. PEN. CODE ANN. art. 666-7(a) (1952), which provides (emphasis added):

> No rule or regulation for which a penalty is prescribed either by this Act or by the Board, shall be adopted by the Board except after notice and hearing. Notice of such hearing shall be given by publication in three (3) newspapers of general circulation in different sections of the State. Such notice shall specify the date and place of hearing and the subject matter of the proposed rule or regulation and shall constitute sufficient notice to all parties. The date of hearing shall be not less than ten (10) days from the date of publication of notice. At such hearing any person, either by himself or by attorney, may present relevant facts either in support or opposition thereto. *The Board shall upon a finding of facts*, have the authority and power to adopt, modify, or alter such rules or regulations.

[58] RULES AND REGULATIONS OF THE TEXAS LIQUOR CONTROL BOARD rule 56 (1969) provides in part:

> Section 3. As provided in Article I, Section 15(e) of the Texas Liquor Control Act, alcoholic beverages owned by members of a private club may be served only to and consumed only by a member, a member's family, or their guests.
>
> . . . .
>
> (3). The word 'guest' shall mean an individual who is personally known by the member or one of the member's family and who is admitted to the club premises by personal introduction of, or in the physical company of, the member or one of the member's family.
>
> Section 4. A Private Club shall provide regular food service adequate for its members and their guests. The term 'food service adequate for its members and their guests' shall mean that complete meals shall be available on the club premises for service to members, their families, and guests.

[59] *See* note 57 *supra.*

[60] *See* note 58 *supra.*

service adequate for its members and guests," the court concluded that these were "words of general understanding."[61] As far as the first term was concerned, the test was a simple one of whether the guest was personally known to and vouched for by a host member. In relation to the second term, the court was of the opinion that the implementation of the statutory requirement that a private club "shall provide regular food service adequate for its members and their guests," in terms of "complete meals available on the club premises,"[62] was sufficiently understandable to the operators of private clubs.

The supreme court appears to be engaging in a realistic analysis of the rule, while at the same time employing a presumption of validity. The court specifically stated that the administrative rule is of equal parity with a legislative enactment.[63] Such a declaration is encouraging, for in reading prior rule-making decisions one could easily conclude that in the past Texas courts have *not* treated agency rules with the dignity of legislative acts, but rather have felt relatively free to substitute their judgment for that of the agencies on the advisability of agency rules. Judicial language to this effect, however, will not be found.[64]

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[61] 457 S.W.2d at 45.

[62] *See* note 58 *supra*.

[63] "A rule or order promulgated by an administrative agency acting within its delegated authority should be considered under the principles as if it were the act of the legislature." 457 S.W.2d at 45.

[64] *See, e.g.*, Texas State Bd. of Examiners in Optometry v. Carp, 412 S.W.2d 307, 314 (Tex. 1967) (dissenting opinion); Texas State Bd. of Examiners in Optometry v. Carp, 388 S.W.2d 409 (Tex. 1965); Gerst v. Jefferson County Sav. & Loan Ass'n, 390 S.W.2d 318 (Tex. Civ. App.—Austin 1965), *error ref. n.r.e.*; Harrington v. State, 385 S.W.2d 411 (Tex. Civ. App.—Austin 1964), *rev'd*, 407 S.W.2d 467 (Tex. 1966).