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ADMINISTRATIVE LAW

by

John L. FitzGerald*

I. CONSTITUTIONAL CONSIDERATIONS

Adequacy of Notice and Hearing. Due process of law requires that a student be given notice and an opportunity for a hearing before he may be suspended from a state university on grounds of misconduct.¹ In a recent case, seven former students at Texas Southern University, a state institution, alleged that they had been suspended from the university in violation of their fourteenth amendment rights to notice and a hearing.² A federal district court dismissed the suit as to all of the plaintiffs.

The court refused to rule on the constitutional arguments of four of the students, applying the familiar rule that the federal courts will not pass on a constitutional issue when alternative grounds exist for deciding the case. The four students in question had failed their courses and thus were scholastically ineligible to return to the university. Since these students could not return to school even if they proved their allegations, the court found that their claims presented "no substantial federal question which is presently justiciable."³

Two other students claimed that the notice given them was inadequate to satisfy due process of law. One was observed by the Dean of Students violating university rules and was at that time told to come to the Dean's office for a conference, but refused. The other had previously conferred with the Dean regarding his purported violation of university rules and had been told that he would be under observation for the rest of the semester; subsequently, the Dean saw him again breaking school rules but did not orally request a conference. The Dean attempted to communicate with both students by mail to request conferences, but since both had moved and had failed to notify the university, as required by the University regulations, neither received his letter. The court held that the requirements of due process were satisfied, concluding that notice in accordance with valid regulations had been given. The court stressed that the Dean had used his best efforts to inform the two students of the nature of the complaints against them and that more was not required.

The seventh student, after being given notice, appeared at conferences with the Dean and the President of the University, following which he was dismissed. The court concluded that since this student had offered no evidence indicating that his hearing was constitutionally inadequate the

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¹ *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1960), cert. denied, 360 U.S. 930 (1961). *Dixon* is reviewed in Note, *Degree of Discretionary Authority Possessed by University Officials in Student Disciplinary Matters—The Availability of Mandamus*, 21 Sw. L.J. 664, 667 (1967).

² *Wright v. Texas S. Univ.*, 277 F. Supp. 110 (S.D. Tex. 1967).

³ *Id.* at 112.

court should not substitute its judgment for that of university officials. The court did not state that an opportunity for a conference would be an adequate hearing in all circumstances; rather, it placed the burden on the complaining student to allege in what manner the hearing given was inadequate. This burden was not carried by the student.

The decision seems entirely correct. It exemplifies a case by case carving-out of fair rules of procedure adjustable to the seriousness of the disciplinary penalty, the presence of controversial facts, and the maintenance of a university community dedicated to high standards of education.

Right To Consolidated Hearing. Several motor carriers applied to the Texas Railroad Commission for authority to transport essentially the same commodities in the same areas. The Commission heard appellees' applications in August 1965; appellants' applications were heard in September and October 1965. The applications of appellees and of one of the appellants were granted. The application of the other appellant was denied because of the grants to its competitors. Appellants brought suit to enjoin appellees from operating under their newly certificated authority.

The district court dismissed the suit, holding that since the appellants had no justiciable interest entitling them to participate in appellees' hearing, from which they had been excluded under rule 30 of the Commission's motor transportation division's procedures,⁴ they had no standing to petition for judicial review of the administrative order.⁵ The court of civil appeals affirmed.⁶ The court said that "[i]t would be indeed strange to hold that one could appeal from the result of a proceeding in which he had no right to appear."⁷

⁴ Rule 30 of the Commission provides in part that "Any party at interest . . . is any motor carrier . . . transporting any of the same class or classes of commodities proposed to be transported by applicant." The trial examiner of the Commission construed this rule to require that a protesting carrier must show that it is presently authorized to transport the commodities named in the application it is protesting. The protesting carriers, excluded under rule 30 from the hearing on the Groendyke application, were separately applying for a certificate to transport the same commodities. The speculative character of their present competitive interest was considered too speculative to qualify them as parties to the hearing on the Groendyke application, or to confer standing to obtain judicial review of the grant of the application, since the protestants' applications might be denied by the Commission. Justice Rutledge similarly pointed out, in *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949), that "suppositious eventualities" are insufficient to confer a right of protest.

Under the present rules of procedure of the Transportation Division, the result might well be different. Rule 26, Rules of Practice and Procedure Before the Transportation Division of the Railroad Commission of Texas, permits consolidation of hearings upon applications if the Commission finds "that the two or more applications . . . or other proceedings involve common questions of law and fact," and further finds "that separate hearings would result in unwarranted expense or delay or substantial injustice."

⁵ Although there is a similarity between requirements for standing to intervene in administrative proceedings and standing to secure judicial review of administrative action, the tests applied are not identical, and the statement of the court of civil appeals is too broad. *Groendyke Transp., Inc. v. Railroad Comm'n*, 426 S.W.2d 645, 648 (Tex. Civ. App. 1968), *error ref. n.r.e.*; 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 22.08 (1958); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 510-11 (1965). Statutes may provide different criteria for establishing the right to an administrative hearing than for establishing the right to judicial review. Further, the terms and conditions of the final order in an administrative proceeding may create a right of judicial review though no right to an administrative hearing therefore existed.

⁶ *Groendyke Transp., Inc. v. Railroad Comm'n*, 426 S.W.2d 645 (Tex. Civ. App. 1968), *error ref. n.r.e.*

⁷ *Id.* at 648.

If a competitor, X, argues that he is entitled to standing to appeal a grant of a certificate to Y merely because he is a competitor of Y, the courts generally reject the argument.⁸ If X attempts to buttress his argument by showing that X is applying for the same kind of certificate as Y and that if X obtains a certificate he may be adversely affected by Y's operations if Y also obtains a certificate, the courts consider X's party-in-interest claim too speculative to recognize.

The appellants, however, presented a much more direct claim of legal injury entitling them to be parties in interest, the so-called *Ashbacker* doctrine.⁹ Appellants argued that they were applying for similar certificates as appellees, that for economic or physical reasons all applications could not be granted by the Commission, and that they were entitled, therefore, to a joint comparative hearing with the opposing applicants as a matter of due process of law.¹⁰ Finally, if so entitled, appellants contended that they qualified as dissatisfied persons entitled to petition for judicial review of the grants to the opposing parties under the Motor Transportation Act.¹¹

The court of civil appeals rejected this claim, noting that the grant of authority to the appellees did not preclude "physically or economically"¹² the possibility of grants to appellants, and that one of the appellants in fact had received a grant. The court gave weight to the administrative burden that would be cast upon the Commission if all competing appli-

⁸ "Decisions go both ways on the right of a competitor to intervene, the result usually being to uphold the administrative decision." 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 327 (1965). See also Oberst, *Parties to Administrative Proceedings*, 40 MICH. L. REV. 378, 404 (1942).

⁹ This rule had its origin in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

The Communications Act permits the FCC to grant but not to deny a broadcasting application without hearing. *Ashbacker* concerned competing applications to operate on the same frequency. The Commission granted one without hearing and set the other for hearing. A majority held that as 'a practical matter' this 'substantially nullified' the statutory right of hearing. The FCC now consolidates into a single proceeding mutually exclusive applications. Though the Government argued that *Ashbacker* could not appeal until and unless its own application was dismissed after hearing, neither majority nor minority chose to deal with this contention. And it seems never to have been made a requirement of review of the refusal of comparative treatment that appellant have exhausted his administrative remedy

L. JAFFE, *supra* note 5, at 444.

As Jaffe further points out, this rule has been extended to competing applications for air routes; and it is the air route cases that the opinion of the court of civil appeals cites. *Northwest Airlines v. Civil Aeronautics Bd.*, 194 F.2d 339 (D.C. Cir. 1952), and *Delta Air Lines v. Civil Aeronautics Bd.*, 228 F.2d 17 (D.C. Cir. 1955), are among the earlier Civil Aeronautics Board cases holding that the *Ashbacker* rule is applicable to contesting applicants for an airline route license which are "as a matter of economic fact mutually exclusive," and therefore each applicant is entitled to a comparative hearing and consideration with his adversary. *Delta Air Lines v. Civil Aeronautics Bd.*, *supra*, at 22 (emphasis added).

¹⁰ The theory presented to the court was that the administrative tribunal is not likely to overturn the first grant it makes, notwithstanding it later hears evidence on the second application; therefore the second hearing (that involving their application) is rendered defective from the standpoint of fullness and fairness.

¹¹ TEX. REV. CIV. STAT. ANN. art. 911b, § 20 (1964).

¹² *Groendyke Transp., Inc. v. Railroad Comm'n*, 426 S.W.2d 645, 650 (Tex. Civ. App. 1968), *error ref. n.r.e.* The court made reference to the rule of the *Ashbacker* case, *supra* note 9, in this connection. It also referred to language in *Alamo Express, Inc. v. Union City Transfer*, 158 Tex. 234, 242, 309 S.W.2d 815, 821 (1958), stating that the administrative tribunal possesses complete discretion with respect to when it will consolidate applications into one hearing. (That case, however, upheld the Railroad Commission's exercise of discretion in consolidating the applications of as many as 128 specialized motor carriers for modification of 150 certificates, each application involving transportation of the same commodities.)

cants must be considered parties in interest for the purposes of each application proceeding.

On motion for rehearing, appellants argued that the *Asbbacker* rule should control because economic or physical reasons dictated that only some (as opposed to all) of the applications in this proceeding could be granted. The opinion on rehearing announced the court's agreement with the *Asbbacker* doctrine,¹³ but pointed out that since this issue was never presented to the Commission before or after denial of a joint comparative hearing by the examiner, its consideration by the court was foreclosed.¹⁴ Hence, the court did not determine whether *Asbbacker* would be applicable under the circumstances urged by the appellants' motion for rehearing.

The *Asbbacker* rule is entirely defensible on grounds of fairness, and its apparent adoption in Texas provides a welcome addition to our law.¹⁵ Nevertheless the decision can be questioned. Questions of law generally are the province of the courts, and whether due process requires that mutually exclusive applications be heard in a consolidated proceeding appears to be a legal question. It seems inconsistent with Texas precedent, upholding review of administrative decisions by de novo trial, with retrial of the facts freely permitted, to apply a different rule to questions of law. However, granted the question whether due process requires the

¹³ The court stated, "when a nonfrivolous allegation of mutual exclusivity of applications is before the [Railroad] Commission, . . . the Commission should decide this issue and, if sustained, grant a full joint and comparative hearing as . . . defined [in *Delta Air Lines v. Civil Aeronautics Board*, 228 F.2d 17 (D.C. Cir. 1955)]." *Groendyke Transp., Inc. v. Railroad Comm'n*, 426 S.W.2d 645, 652 (Tex. Civ. App. 1968), *error ref. n.r.e.*

¹⁴ The court's decision on the appeal, *id.* at 647, states: "This record shows that appellants requested the Commission to consolidate, for hearing, all applications, theirs, appellees and other carriers, for similar authority, which request is denied." In *Northwest Airlines v. Civil Aeronautics Bd.*, 194 F.2d 339 (D.C. Cir. 1952), the court considered the question whether the petitioning carrier forfeited its right to a simultaneous hearing by not making the request before the examiner's hearing began. The carrier had waited until the hearing ended and it filed its exceptions to the examiner's report. The court said, *id.* at 345: "When that information is given to the Board in less formal fashion, as it was in this case, it would be harsh indeed to deny the applicant a fundamental right simply because of the informality of his approach."

Groendyke Transport, Inc., after losing its appeal due to lack of standing, *Groendyke Transp., Inc. v. Railroad Comm'n*, 426 S.W.2d 645 (Tex. Civ. App. 1968), *error ref. n.r.e.*, subsequently was enjoined from further operation under its newly amended motor carrier's certificate and the court set aside the Railroad Commission's orders granting the new certification to *Groendyke*. The court held that the carriers, whose newly amended certificates *Groendyke* was precluded from contesting in the earlier decision, had shown there was no need for additional carrier certifications for the routes and commodities involved, *e.g.*, *Groendyke's* administratively approved proposal. *Railroad Comm'n v. Robertson Transp., Inc.*, 427 S.W.2d 333 (Tex. Civ. App. 1968), *error ref. n.r.e.*

¹⁵ In a later case, a court of civil appeals, citing the *Groendyke* decision, adopted the view that when two applications are mutually exclusive, comparative hearings are proper, in view of the possibility that the Savings and Loan Commissioner after hearing the evidence may grant one application to the exclusion of the other. *Peoples Sav. & Loan Ass'n v. Community Sav. & Loan Ass'n*, 430 S.W.2d 708 (Tex. Civ. App. 1968), *error ref. n.r.e.*

However, it should be noticed that in the *Peoples* case separate (though comparative) hearings were held on the application by one party for a new savings and loan charter in Llano, and on the application by a savings and loan association for a branch office in Llano. Thereafter, separate decisions were handed down by the Commissioner, but only after consulting the records made in both cases. He denied both applications. *Delta Air Lines v. Civil Aeronautics Bd.*, 228 F.2d 17 (D.C. Cir. 1955), condemned a proposed procedure for "simultaneous decision" of *separate* hearings as not satisfying the comparative hearing requirement of the *Asbbacker* rule. The Court said: "The Court was concerned with the right to hearing, not merely the rendition of decision. The requirement for a comparative proceeding means all the give-and-take of contesting parties, including cross-examination, rebuttal, participation in prehearing proceedings, objection, briefs and arguments as contesting parties." 228 F.2d at 22.

agency to hold a consolidated hearing is a legal one, a factual issue is indispensable to its solution, namely whether the applications involved are mutually exclusive. The latter requires an administrative policy conclusion, and this may be a pragmatic reason to support the court's ultimate disposition of the proceeding. Moreover, were it not for the Texas *de novo* trial tradition—a compromise in statutory construction due to separation of powers impediments to complete *de novo* review—it would be clearly preferable, under the analogy of requiring that administrative remedies be exhausted before judicial relief is sought, that the administrative tribunal be given the opportunity to consider in its proceeding any issue that will be raised on review.

II. ADMINISTRATIVE ADJUDICATION

Res Judicata.

While in theory the principles of *res judicata* are not strictly applicable to administrative adjudication, there appears to be an increasing trend, on the part of state courts particularly, to deny state administrative agencies the power to revoke their prior decisions with retroactive effect where to do so would cause injury to a party. Sometimes, indeed, the courts press this doctrine to its logical conclusion by asserting that, in proper cases at least, the doctrine of *res judicata* should apply in administrative proceedings.¹⁶

It was contended in a federal district court case,¹⁷ somewhat unusual on its facts, that the negative finding of a jury in a previous civil action barred, under the rules of collateral estoppel and *res judicata*, a subsequent award of compensation benefits by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act.¹⁸

The plaintiff sued to recover for personal injuries allegedly received while working on board a vessel. Judgment was entered that the plaintiff take nothing, based upon a jury finding that the plaintiff did not sustain the injury while working aboard the vessel. Thereafter, the plaintiff filed a claim for compensation for the same injury under the Longshoremen's Act, and after a full hearing the Deputy Commissioner found that the claimant did receive the injury while working on the vessel. The Deputy Commissioner entered an award, and rejected the asserted defenses of collateral estoppel and *res judicata*.

The federal district court refused to set the award aside, holding that the standard of proof required to establish a fact before the Deputy Commissioner is less stringent than that needed to establish a fact before a jury. Before a jury facts must be established by a preponderance of the evidence. But, under the applicable provisions of the Administrative Procedure Act,¹⁹ an order of the Deputy Commissioner need only be supported by "substantial" evidence, a lesser standard which has been likened to the "substantial" evidence required by a reviewing court in affirming

¹⁶ Cooper, *Administrative Law*, 10 WAYNE L. REV. 1, 8 (1963).

¹⁷ Strachan Shipping Co. v. Shea, 276 F. Supp. 610 (S.D. Tex. 1967).

¹⁸ 33 U.S.C. §§ 901-50 (1965).

¹⁹ 5 U.S.C. § 556(d) (1965).

the findings of an agency hearing examiner.²⁰ Since the doctrines of res judicata and collateral estoppel are confined to instances in which "the fact issue raised in the second proceeding is identical in all respects *and the applicable legal rules remain unchanged*,"²¹ the court concluded that they were not applicable. As further support for its decision, the court stated that under the policy of the Longshoremen's Act doubtful questions of fact should be resolved in favor of the claimant, a presumption not available to a jury operating under a preponderance of the evidence standard.

Administrative Finality. Recently, a court of civil appeals held that if the record of proceedings taken before the state Savings and Loan Commissioner shows that a city can sustain a new branch office of a savings and loan association, or a newly chartered association, but not both, then once the Commissioner grants one application he no longer has the freedom to grant the other.²²

In this case the Commissioner concluded that there was insufficient business in the city of Llano to support either a branch office of Community Savings and Loan or a new facility, the proposed Peoples Savings and Loan, and denied both applications. Both applicants appealed, their appeals were consolidated for trial purposes only, and the district court reversed the Commissioner as to each appeal. Judgment became final in Peoples' application for a new charter since the Commissioner did not make a timely motion for a new trial.²³ Pursuant to the district court's reversal the Commissioner granted a charter to Peoples.

The Commissioner timely filed a motion for new trial in Community's application for a branch office and a retrial was held. The district court again reversed the Commissioner's denial of the application, holding that it was not supported by substantial evidence. The court of civil appeals, however, reversed the district court on the ground that the district court had ignored the fact that the Commissioner had, prior to the retrial, granted Peoples' application for a new charter. This supervening fact was not part of the administrative record before the court of civil appeals.²⁴ However, since the record did show that Llano could not support both facilities, the court concluded that it should take judicial notice of the fact that Peoples' application for a new charter already had been granted.²⁵ Had the court not taken such notice, it may be inferred that the court would have held that there was no substantial evidence supporting the

²⁰ *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied*, 360 U.S. 931 (1959); U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 76 (1947).

²¹ *Strachan Shipping Co. v. Shea*, 276 F. Supp. 610, 614 (S.D. Tex. 1967).

²² *Peoples Sav. & Loan Ass'n v. Community Sav. & Loan Ass'n*, 430 S.W.2d 708 (Tex. Civ. App. 1968), *error ref. n.r.e.*

²³ *Buttery v. Belts*, 422 S.W.2d 149 (Tex. 1968).

²⁴ On appeal, the court is restricted to a review of the administrative record. See the text accompanying note 45 *infra*.

²⁵ The Supreme Court of Texas denied a writ of error, *n.r.e.*, 12 Tex. Sup. Ct. J. 75 (Oct. 30, 1968), holding that substantial evidence supported the Commissioner's denial of application, and withholding opinion on the correctness, under the revised Savings and Loan Act, of taking judicial notice of a supervening event not part of the administrative record under review.

Commissioner's action. Thus, by taking judicial notice of the extra-record fact, the court avoided interfering with the Commissioner's discretion.

III. JUDICIAL REVIEW

Method of Review. The Safety Responsibilities Law²⁶ provides that a vehicle operator involved in an accident within the state, in which accident a person is killed or injured, or the property damage of any one person is one hundred dollars or more, must file a report of the accident with the Department of Public Safety. Upon receipt of the report the Department may suspend the operator's license and motor vehicle registration unless the operator has been released of liability, has insurance, or proves that he is financially responsible and deposits security in an amount the Department finds sufficient to satisfy any judgments for damages resulting from the accident.²⁷ The Department must give notice to the operator ten days prior to the effective date of the suspension, within which period the operator must comply with these financial requirements.²⁸ If the suspension becomes effective, the Department is authorized to give the operator notice to surrender his license and registration.²⁹ An operator may appeal any order or act of the Department to the county court of the county of his residence.³⁰

The Department gave notices of suspension to a number of vehicle operators who resided in Harris County. They appealed to the county court of Shelby County, and that court stayed the suspension orders. Since the stay orders were temporary, the Department could not appeal. Ignoring the stay orders, the Department notified the operators to surrender their licenses. The operators sought successfully to have these notices set aside in the county court of Harris County.

On appeal the Department admitted that if the stay orders of the Shelby County court were valid, the suspensions never became effective and it had no authority to issue the surrender notices. It argued, however, that the Shelby County court had no jurisdiction to issue the stay orders since it was not in the county of the operators' residence. The court of civil appeals rejected the Department's argument and affirmed the trial court.³¹ Characterizing the Shelby County court as a court of general jurisdiction, it held that its jurisdiction could not be collaterally attacked in the Harris County suit by the introduction of extrinsic evidence, *i.e.*, the fact of the operators' residence. Thus the Shelby County court's stay orders were valid, the suspension orders never became final, and the surrender notices of the Department were improperly issued.

The decision seems questionable. As a general rule, when a method of appeal is provided by statute, other methods of judicial review are pre-

²⁶ TEX. REV. CIV. STAT. ANN. art. 6701h, §§ 2(b), 4, 5 (1960).

²⁷ *Id.* § 5(b).

²⁸ *Id.* § 4.

²⁹ *Id.* § 5(b).

³⁰ *Id.* § 2(b).

³¹ Texas Dept. of Pub. Safety v. Morris, 426 S.W.2d 290 (Tex. Civ. App.), *rev'd*, 12 Tex. Sup. Ct. J. 167 (Dec. 31, 1968).

cluded. Since the operators filed their first appeal in a court other than the one designated by statute, there seems to be a lack of jurisdiction on the part of that court. This being so, the Department's contention that the suspension orders had become final and unchallengeable as of the time of the second appeal, thus authorizing the surrender notices, should have been sustained.³²

Statutory Interpretation. In the survey period Texas courts in several instances passed upon questions of law arising out of the interpretation of statutes controlling the powers, functions, and duties of administrative tribunals.³³ In each instance the court decided the question of law independently, and in all but one case seemed to give no particular weight to the interpretation of the statute given by the administrative tribunal.³⁴

³² This was the opinion of the supreme court in *Texas Dept. of Pub. Safety v. Morris*, 12 Tex. Sup. Ct. J. 167 (Dec. 31, 1968). It held that the Shelby County court was "conducting a special proceeding which exists only by reason of special statutory authorization," so was not for that proceeding a court of general jurisdiction. *Id.* at 168. Thus its jurisdiction could be collaterally attacked.

³³ See also note 34 *infra*. The distinction between questions of law, to be decided by the court, and questions of fact, to be decided by the administrative agency, is discussed in *Dobson v. Commissioner*, 320 U.S. 489 (1943). See also 2 F. COOPER, *supra* note 8, at 665-67; 4 K. DAVIS, *supra* note 5, § 30.03. At 1 K. DAVIS, *supra* note 5, § 5.06, it is said: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect," citing *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827).

³⁴ In *Kraft v. Texas Employment Comm'n*, 418 S.W.2d 482 (Tex. 1967), the Supreme Court of Texas re-examined an earlier decision by a Texas court of civil appeals and adhered to the rule announced in that case, *Texas Employment Comm'n v. Hodson*, 346 S.W.2d 665 (Tex. Civ. App. 1961), *error ref. n.r.e.*, deeming it a reasonable interpretation of the Texas Unemployment Compensation Act. The court further said its view was supported by the failure of three succeeding sessions of the legislature to change the decision by amending the statutory section (TEX. REV. CIV. STAT. ANN. art. 5221b-3(d)(1) (1962)) construed in the opinion. 418 S.W.2d at 486.

A court of civil appeals in its interpretation of one of the appeal provisions of the new Mineral Interest Pooling Act, TEX. REV. CIV. STAT. ANN. art. 6008c, § 2(g) (1965), undertook to give the statute a more reasonable construction. *Miller v. Railroad Comm'n*, 428 S.W.2d 162 (Tex. Civ. App.), *rev'd*, 12 Tex. Sup. Ct. J. 141 (Dec. 4, 1968). Section 2(g) of article 6008c of the Mineral Interest Pooling Act provides that any person aggrieved by an order of the Railroad Commission "effecting pooling" may appeal to the district court of the county in which the land is located, and provides that this provision is exclusive. Under another statute, TEX. REV. CIV. STAT. ANN. art. 6049c, § 8 (1962), any interested person "affected" by an order of the Commission under the conservation laws relative to crude petroleum oil or natural gas, who may be dissatisfied therewith, may file a suit in a court of competent jurisdiction in Travis County, and not elsewhere against the Commission to test the validity of the order. The court held that a forced pooling application to pool a four-acre tract with an existing 650-acre gas unit, if denied by order of the Commission, nevertheless resulted in an order "effecting pooling" since, until the denial, there was the possibility that an order for a 654-acre unit would be issued. Inasmuch as the statute refers to orders effecting pooling, and article 6049c (which is expressly referred to in the statute in question) is available for appeals from other orders, the holding seems to extend unduly the natural and literal meaning of the statutory term "effecting pooling." This was the view expressed by the supreme court in reversing the court of civil appeals and affirming the trial court. In neither the court of civil appeals' nor the supreme court's opinion is consideration given to the Railroad Commission's interpretation of the statutes. This is logical, however, since the statutes in question have no direct relevancy to the Commission's administration of the oil and gas conservation laws.

The supreme court affirmed the interpretation of the Department of Public Safety that the holder of a self-insurance certificate must not only have more than twenty-five cars registered in his name when he obtains the certificate, but at all times thereafter. *Texas Dept. of Pub. Safety v. Banks Transp. Co.*, 427 S.W.2d 593 (Tex. 1968). (The opinion of the court of civil appeals was reported in last year's *Survey* article, FitzGerald, *Administrative Law, Annual Survey of Texas Law*, 22 Sw. L.J. 223, 225-26 (1968)). TEX. REV. CIV. STAT. ANN. art. 6701h(34) (1960) expressly provides for the former requirement but is silent as to the latter. In upholding the Department, the court, so far as its opinion shows, gave no particular weight to the construction the Department had given the Act.

However, in *City National Bank v. Falkner*³⁵ a court of civil appeals adopted the Banking Commissioner's interpretation of the statutory provision under consideration. Texas State Bank had moved its location in the city of Austin. City National Bank sought a declaration in the state district court that it was within the exclusive power of the State Banking Board to grant or deny permission to Texas State Bank to make such a move, and asked for appropriate injunctive relief. City National relied upon a 1967 amendment to the Texas Banking Code which apparently gave exclusive power to the Board.³⁶ The amendment was held unconstitutional by the court of civil appeals. The court adopted the administrative practice and interpretation under the unamended statutes as declared in an affidavit of the Banking Commissioner. It appearing from the affidavit that it was not necessary for the Board to approve a change of location, the court of civil appeals affirmed the trial court's denial of relief.

That the courts will not abdicate their responsibility for statutory interpretation, however, was made evident by the same court of civil appeals, speaking in another case through the same judge.³⁷ The Railroad Commission urged the court to follow the Commission's long established policy of using May 29, 1934, as the date to determine when an illegal subdivision occurred in the East Texas Field, although this policy was contrary to a supreme court decision. The court replied, "The Commission cannot validly build a departmental construction based on repeated violations of decisions of our courts."³⁸

The Substantial Evidence Rule. The substantial evidence rule³⁹ is generally⁴⁰ applied by Texas trial courts sitting de novo and looking to the record compiled in the court on appeal rather than to the record in the administrative hearing.⁴¹ An exception to this practice, discussed in last year's *Survey*,⁴² is that courts are now limited under the revised Savings and Loan Act⁴³ to deciding whether there is substantial evidence in the record of the *administrative proceeding* to support the Commissioner's grant or denial

³⁵ 428 S.W.2d 429 (Tex. Civ. App. 1968), *error ref. n.r.e.* The Supreme Court of Texas, however, disagreed with certain portions of the opinion of the court below, not here relevant. 432 S.W.2d 689 (Tex. 1968).

³⁶ TEX. REV. CIV. STAT. ANN. art. 342-315 (1967).

³⁷ *Railroad Comm'n v. Humble Oil & Ref. Co.*, 424 S.W.2d 474 (Tex. Civ. App. 1968).

³⁸ *Id.* at 478.

³⁹ The contemporary version of the 'substantial evidence' rule as applied in the state courts is predicated upon the statement made by the United States Supreme Court in [*Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)] that under this rule the reviewing court is authorized to set aside administrative findings of fact when—and only when—the court (after taking 'into account whatever in the record fairly detracts from' the weight of the evidence supporting an agency's findings of basic fact) is left with the conviction that 'the record . . . clearly precludes' the agency's 'decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.'

2 F. COOPER, *supra* note 8, at 727.

⁴⁰ See FitzGerald, *Administrative Law, Annual Survey of Texas Law*, 21 Sw. L.J. 199 n.4 (1967).

⁴¹ *Id.*

⁴² FitzGerald, *Administrative Law, Annual Survey of Texas Law*, 22 Sw. L.J. 223, 226 (1968).

⁴³ TEX. REV. CIV. STAT. ANN. art. 852(a) (1964); see *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1967).

of an application for a new charter or branch office. How much more discretion is thus available to the state for regulating the savings and loan field than is available to it for administering state functions in other areas, in which the state by statute is subject to greater judicial supervision, will depend considerably on the extent to which the courts weigh the evidence taken by the Commissioner. They have seemingly weighed the evidence in savings and loan cases more than in other instances of review of administrative action and there are signs that the courts of civil appeals continue to do so,⁴⁴ just as there are signs that the supreme court is taking a more restrictive view of the proper role of the reviewing court.⁴⁵

In a recent court of civil appeals case⁴⁶ a concurring judge criticized the Texas substantial evidence rule, as applied in the case, which requires trial de novo (but rejects review de novo) on the appeal of many administrative orders. A fire chief was discharged after a hearing held by the local civil service commission. His written admission of the offense charged was not received into evidence by the commission, but its substance was testified to by the fire chief. On appeal by trial de novo, the district court admitted the written statement, and upheld the commission. The majority of the court of civil appeals affirmed the trial court, finding that the evidence taken by the court constituted substantial evidence on which to base the administrative order.

Justice Cadena would have affirmed on the basis of the administrative record rather than the trial record. He contended that to look to the

⁴⁴ See, e.g., *Gerst v. Houston First Sav. Ass'n*, 422 S.W.2d 514 (Tex. Civ. App. 1968); *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 421 S.W.2d 449 (Tex. Civ. App. 1967), *rev'd*, 432 S.W.2d 702 (Tex. 1968); *Spring Branch Sav. & Loan Ass'n v. Gerst*, 420 S.W.2d 618 (Tex. Civ. App. 1967).

It is to be noted that the reversals of the Commissioner's actions by the district courts and courts of civil appeals have, in the random cases cited, occurred when the Commissioner was denying a savings and loan charter or branch office application. In an application for a state bank charter, under a reasonably similar statute insofar as statutory qualifications are concerned, the district court and the court of civil appeals affirmed the State Banking Board's approval of the application for bank charter. *First Nat'l Bank v. State Banking Bd.*, 419 S.W.2d 878 (Tex. Civ. App. 1967).

⁴⁵ *Gerst v. Guardian Sav. & Loan Ass'n*, 425 S.W.2d 382 (Tex. Civ. App.), *aff'd in part and rev'd in part*, 12 Tex. Sup. Ct. J. 114 (Nov. 13, 1968) (Commissioner approved one application for a branch office at an intersection and denied the other, ruling that the market would not support both and rejecting, after a consolidated hearing, the application that was filed one hour earlier. He found the latter would impair the expansion opportunity of the main office of the other association located two miles away from the intersection. The district court and court of civil appeals reversed, holding that the findings of the Commissioner were not supported by substantial evidence. The supreme court, reserving the question whether the earlier filed application would be decided first, reversed the lower courts and held there was substantial evidence supporting the findings of the Commissioner that (1) there was not room in the market for two new branch offices, and (2) a branch office grant to Guardian would impair the existing main office expansion of its opponent, Richardson. With reference to an apparent contradiction in testimony on the issue of impairment the supreme court said: "The credibility of witnesses is within the province of the Commissioner." *Id.* at 116.); *Gerst v. Goldsbury*, 425 S.W.2d 14 (Tex. Civ. App.), *rev'd sub nom. Savings & Loan Comm'r v. Goldsbury*, 12 Tex. Sup. Ct. J. 111 (Nov. 13, 1968) (the Commissioner denied a savings and loan charter due to lack of public need and lack of assurance of profitable operation; the district court reversed, and the court of civil appeals affirmed on the basis that there was no substantial evidence to support the negative findings of the Commissioner; the supreme court reversed, holding that if the evidence is substantial enough to support either affirmative or negative findings by the Commissioner the reviewing court should not superimpose its judgment).

In these cases a court of civil appeals reversed an administrative denial of a permit. *But see Peoples Sav. & Loan Ass'n v. Community Sav. & Loan Ass'n*, 430 S.W.2d 708 (Tex. Civ. App. 1968), *error ref. n.r.e.*, in which the Commissioner's denial of *both* applications was reversed, but his denial of *one* application was upheld.

⁴⁶ *Garcia v. City of San Antonio*, 427 S.W.2d 947 (Tex. Civ. App. 1968), *error ref. n.r.e.*

trial court record, containing different evidence from the administrative record, for substantial evidence supporting the administrative action defeated an express statutory requirement that the commission "render a fair and just decision, *considering only the evidence presented before them in such hearing.*"⁴⁷ In the same vein, he considered that looking to different evidence in the trial court deprived the chief of "a fair and impartial hearing before an agency which will act only on the basis of the evidence which it hears."⁴⁸ Limiting judicial review of administrative action to the evidence actually heard by the commission, he argued, would not violate the doctrine of separation of powers as the doctrine had been held to be violated by a statute requiring the reviewing court to establish administrative policy.⁴⁹

Justice Cadena is correct that the separation of powers doctrine does not stand in the way of his suggestion. It seems clear, however, that the majority view is not founded on a concept of separation of powers. It is founded, as is Justice Cadena's for that matter, on statutory construction—giving partial, though not complete, effect to the provision of this statute and many other statutes that appeals to the district court from decisions of the commission "shall be tried *de novo.*"⁵⁰ Giving literal effect to this type of statute would require an independent judicial determination of the issues which would be prohibited by the separation of powers provision of the Texas Constitution⁵¹ if one or all of the issues were inherently administrative in nature. The Texas courts, wherever possible, have given a limited, middle-of-the-road interpretation to such statutes: allowing the facts to be re-tried on appeal from the administrative order, refraining from deciding such issues on the basis of the judicial trial, and approving the order if supported by substantial evidence in the judicial record.

Thus this type of statutory provision traditionally has been construed as an expression of legislative will binding the courts to give at minimum the scope of review given in this case. No doubt Texas courts would prefer to give a more restrictive view, but they have felt obligated to observe the legislative will in this regard.⁵² For the same reason, Justice Cadena would have the courts observe the statutory provision to which he called attention. It would seem, however, as a matter of statutory construction, that the apparent majority view is correct, since the provision quoted by Justice Cadena applies by its terms only to the administrative hearing, not to the appeal.

⁴⁷ TEX. REV. CIV. STAT. ANN. art. 1269m, § 16a (1963). See also *Garcia v. City of San Antonio*, 427 S.W.2d 947, 950 n.1 (Tex. Civ. App. 1968), *error ref. n.r.e.*

⁴⁸ *Garcia v. City of San Antonio*, 427 S.W.2d 947, 951 (Tex. Civ. App. 1968), *error ref. n.r.e.*

⁴⁹ See *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1967).

⁵⁰ TEX. REV. CIV. STAT. ANN. art. 1269m, § 18 (1963).

⁵¹ TEX. CONST. art. II, § 1.

⁵² Larson, *The Substantial Evidence Rule: Texas Version*, 5 Sw. L.J. 152 (1951).