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ADMINISTRATIVE LAW AND PROCEDURE

CONTEST OF UTILITY RATE — LIMITATION OF JUDICIAL REVIEW — EXHAUSTION OF ADMINISTRATIVE REMEDY

New Mexico. A ratemaking case with an unusual twist was decided in *State v. Mountain States Tel. & Tel. Company.*[1] A public utility corporation had applied to the State Corporation Commission for authority substantially to increase its rates for telephone service. The Commission approved an increase of approximately fifty per cent, the largest proportional rate boost in the company's history.

The Attorney General of the State of New Mexico felt that such action was unreasonable to the public and commenced an action in the supreme court to set aside the order. The court refused to interfere with the Commission's action. Conceding that the rate may very well have been unreasonable, the court pointed out that the Commission represented the public and ruled that its orders are conclusively presumed to be reasonable so far as the public was concerned.

Two objections may be made to the holding in this case. First, ratemaking is a quasi-legislative act, but it is not suggested that the whole plenary power of the legislature is invested in the Commission. The common law prescribes the rule that the rate shall be reasonable, and the statute delegating this power to the Commission necessarily implies the same limitation.[2] The courts should review decisions of administrative agencies to protect the public as well as the private parties against arbitrary action or errors

[1] 54 N. M. 315, 224 P. 2d 155 (1950).

[2] *Cf.* Village of Saratoga Springs v. Saratoga Gas, Light and Power Co., 191 N. Y. 123, 83 N. E. 693 (1908).

of law. Nor can it be maintained that the state is precluded from maintaining an action on behalf of the public against a public agency. The modern view of the Supreme Court of the United States is that a government may create a justiciable controversy against itself acting in another capacity.[3]

Transcontinental Bus System v. State Corporation Commission[4] represented the culmination of five years of litigation over the adequacy of bus service between Las Cruces and Hot Springs. In 1946 the Corporation Commission granted certificates of convenience and necessity to operate passenger bus service to three applicants. One of these, the plaintiff's assignor, had received his hearing months before, and the Commission purported to consider the effect of his proposed operations on the adequacy of the service but took no evidence on this point. The order of the Commission accordingly was based on some sort of evidence outside the record.

In a suit to set aside the order, the district judge ruled that the order was erroneous and was about to remand to the Commission when the supreme court granted a writ of prohibition against the remand on the ground that an invalid order could not be sent back to the issuing agency.[5] In the course of the opinion the court suggested that the district judge

> ... might conclude that the order was reasonable and lawful in part, and invalid in part. In such event *he could amend the order so as to approve the valid part only.*[6]

On remand, the district judge followed the procedure suggested and amended the Commission's order. Another appeal to the supreme court followed, in which the court reversed itself and held that the separation of powers inherent in the New Mexico Constitution prohibited judicial revision of administrative orders. The court concluded that on review of an administrative decision the judiciary may only determine whether the order is lawful and

[3] United States v. Interstate Commerce Commission, 337 U. S. 426 (1949).
[4] 56 N. M. 158, 241 P. 2d 829 (1952).
[5] State *ex rel.* Transcontinental Bus Service v. Carmody, 53 N.M. 367, 208 P. 2d 1073 (1949).
[6] 208 P. 2d at 1080. Emphasis supplied.

reasonable, and upon a contrary finding may only vacate the action and rescind the certificate granted thereunder.

An important question of administrative remedies was raised in the celebrated case of *Zellers v. Huff*.[7] The petitioning taxpayers and parents of school children sought the dismissal of a group of public school teachers, all members of Roman Catholic orders, on the ground that their allegiance to the Roman church under its laws and their past record of infusing Catholic doctrine into their teaching rendered them incompetent to instruct in public schools. The Legislature had provided that the State Board of Education could dismiss teachers for cause after a hearing.[8] The petitioners in this case requested the Board to take such action but were denied a hearing on the ground that dismissal proceedings were initiated solely on the Board's own motion. Nevertheless, when they took the case to court, they were met with the objection that administrative remedies had not been exhausted.

The supreme court held that this statutory provision did not grant the public an adequate remedy against incompetent teachers. If a purely discretionary hearing by the Board were considered prerequisite to court action, interested parties could be denied relief against arbitrary and capricious action of the Board.

Sufficiency of Legislative Standard

Oklahoma. The United States Court of Appeals sustained the constitutionality of Oklahoma's fire hazard abatement statute in *American Home Fire Assurance Company v. Midwest Enterprise Company*[9] against a contention that it vested arbitrary power in the fire marshal and his subordinates without sufficient standards.

The critical part of the statute allows the state fire marshal, fire chiefs or sheriffs to order the destruction of any structure upon a finding that "any building or other structure which for the want of proper repair, or by reason of age and dilapidated condition, or

[7] 55 N. M. 501, 236 P. 2d 949 (1951).
[8] N. M. Stat. 1941 Ann. §§ 55-105, 55-1113.
[9] 189 F. 2d 528 (10th Cir. 1951).

for any cause" is especially liable to fire, or "is so situated as to endanger other buildings or property," or is "so occupied that a fire would endanger persons and property therein."[10] Other portions of the statute allow appeal to the fire marshal if destruction is ordered by an inferior officer and thereafter an appeal de novo to the district court.

The court held that while the statute was less succinctly phrased than might be desired, it could not be said to vest arbitrary power in the officers administering it, especially in view of the provision for judicial review.

NECESSITY FOR ADMINISTRATIVE FINDINGS — DETERMINATION OF PREVAILING WAGE RATES — JUDICIAL REVIEW OF CIVIL SERVICE DEMOTION

Texas. The requirement of findings in orders of administrative agencies has come under judicial review in several Texas decisions during the past year. *Thompson v. Hovey Petroleum Company*[11] and its companion case, *Thompson v. Railroad Commission,*[12] reversing decisions of the court of civil appeals, arose on appeal from the order of the Railroad Commission granting the Hovey Petroleum Company authority to transport certain chemicals by truck. The order summarized at length the testimony heard by the Commission, and then concluded,

> The Commission further finds from the evidence and its own records, after carefully considering the existing transportation facilities and demand for and the need of additional service, that the service and facilities of the existing carriers serving the territory are inadequate.[13]

It was contended by appellant that such an order failed to meet the statutory requirements applicable to special carriers:

> ... The order of the commission granting said application and certificate issued thereunder shall be void unless the commission shall set

[10] 74 OKLA. STAT. ANN. (Perm. Ed.) § 317.

[11] .....Tex....., 236 S. W. 2d 491 (1951), *rev'g* 232 S. W. 2d 146 (Tex. Civ. App. 1951).

[12] .....Tex....., 240 S. W. 2d 759 (1951), *rev'g* 232 S. W. 2d 139 (Tex. Civ. App. 1951).

[13] 240 S. W. 2d at 762.

> forth in its order full and complete findings of fact pointing out in detail the inadequacies of existing carriers....[14]

The supreme court, agreeing with this contention, declared that the "findings of fact" contemplated by the statute must include evidentiary facts, not merely the ultimate conclusion that existing service was inadequate.

A mix-up followed the decision in the *Hovey* case. On the assumption that an order like the one quoted above was void (as indeed the statute declared it to be), the court of civil appeals reversed its previous holding and allowed a collateral attack on such order in *Roberdeau v. Railroad Commission.*[15] On rehearing in the second *Thompson* case, however, the supreme court held that, while the order was subject to direct attack, it was not void in the sense of permitting collateral attack to be made upon it. The *Roberdeau* case accordingly was reversed again.[16]

Contrary to the underlying approach of the supreme court in the *Thompson* cases is a recent decision of the court of civil appeals in *Merchants Fast Motor Lines v. Newman.*[17] In this case, presenting a contest of an order of the Texas Railroad Commission granting a certificate of convenience and necessity to a motor carrier, the contestant's evidence showed that upon the administrative hearing the examiner had taken longhand notes of the testimony and then had privately conferred with the Commission without filing a written report. This procedure was not in conformity with the provisions of the applicable statute which states:

> ... [I]t shall be his [the examiner's] duty promptly to make a written report to the Commission recommending disposition of said application. Such report and recommendation shall be accompanied by a brief narrative statement of the evidence....[18]

The court held, nevertheless, that the irregularities set out were not such as to invalidate the Commission's order. The requirement of a written report, said the court, was for the benefit of the Com-

[14] TEX. REV. CIV. STAT. (Vernon, 1948) art. 911b, § 5a(d).
[15] 239 S.W. 2d 889 (Tex. Civ. App. 1951).
[16] Roberdeau v. Railroad Commission, ...Tex....., 242 S.W. 2d 881 (1951).
[17] 236 S.W. 2d 646 (Tex. Civ. App. 1951) *er. ref.*
[18] TEX. REV. CIV. STAT. (Vernon, 1948) art. 911b, § 14(b).

mission and could be waived by it. In effect, the clear-cut mandate of the statute was construed as merely directory.

This decision, if it remains the law, will remove an important procedural safeguard of the rights of parties before administrative agencies. Where no written report of the findings of the hearing officer is submitted to the Commission, the applicant can have no adequate opportunity to contest his undisclosed findings in any subsequent hearing before the Commission.

The Supreme Court of the United States frequently has lashed out against this sort of procedure. In the *First Morgan* case[19] Chief Justice Hughes argued,

> Those who are brought into contest with the Government in a quasi judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

The proposed Texas Administrative Procedure Act anticipates this problem and would rephrase the statutory provisions to avoid the result in the *Newman* case[20]

Texas Highway Commission v. El Paso Building and Construction Trades Council[21] involved the validity of a "prevailing wage" determination of the Highway Commission in a road construction contract, the union contending that the Commission had settled on a figure which represented, if anything, the minimum wage.

The court pointed out that by statute,

> ... The term "general prevailing rate of per diem wages" shall be the rate determined upon as such rate by the public body awarding the contract, or authorizing the work, *whose decision in the matter shall be final*. . . .[22]

This provision was held to preclude recourse to the courts. The

[19] Morgan v. United States, 304 U. S. 1, 18, 19 (1937).

[20] Article 13b of the proposed code reads: "The hearing officer shall prepare a proposed decision, consisting of findings of fact and recommended order, rule, or other action, in such form that it may be adopted as the decision in the case. Copies of the proposed decision shall be served upon all parties, who shall then be given a reasonable time within which to submit to the agency exceptions to the proposed decision and briefs in support thereof."

[21] .....Tex....., 234 S. W. 2d 857 (1950), *rev'g* 231 S. W. 2d 533 (Tex. Civ. App. 1950).

[22] TEX. REV. CIV. STAT. (Vernon, 1948) art. 5159a, § 4. Emphasis supplied.

appellants contended that they had a right to review on constitutional grounds, but the court pointed out that the constitution did not afford anyone a right to employment at a "prevailing wage."

Another important question on the scope of judicial review was decided by the supreme court in *City of Amarillo v. Hancock.*[23] Hancock was a captain in the Amarillo Fire Department and suffered the misfortune of having a building burn to the ground shortly after he had left the scene with his firemen, believing the fire to be out. The Civil Service Commission reduced his rank and pay to ordinary fireman upon recommendation of the head of the department, although very little evidence was introduced at the hearing to substantiate the charge that he had carried out his duties negligently. Hancock appealed to the district court and the court of civil appeals, which held the Commission's order void for want of substantial supporting evidence. The supreme court, however, reversed the lower courts on the ground that the district court had no jurisdiction to review the order of the Commission.

Under the applicable statute jurisdiction is limited to cases of "suspension or dismissal."[24] Since Hancock was demoted and not dismissed or suspended, the supreme court held that he had no statutory right to the judicial review. The court further held that in the absence of statutory protection a public officer has no vested property right in his rank and that demotion to a position of lesser salary and prestige is consequently not a deprival of property without due process of law. The constitutional basis for review thus removed, the court held that Hancock had no standing to appeal to the courts from the order of the Commission.

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[23] _____Tex._____, 239 S. W. 2d 788 (1951).

[24] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1269m, § 18. *Cf.* § 19 as to demotion procedure.