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Administrative Law and Procedure

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SURVEY OF SOUTHWESTERN LAW FOR THE YEAR 1952
ADMINISTRATIVE LAW AND PROCEDURE
SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

The increasing reluctance of courts to interfere with administrative decisions, irrespective of provisions of statutes calling for judicial review, is evidenced by recent decisions of the highest courts of Oklahoma, Texas, Arkansas, and New Mexico.

Oklahoma. In Oklahoma, on judicial review of decisions of the Corporation Commission, the supreme court, by statute, exercises independent judgment on the law and the facts whenever a constitutional right is claimed to have been violated. In all other cases the review is to determine merely whether the Commission regularly pursued its authority and whether its findings and conclusions are sustained by the law and substantial evidence.[1] In *Anderson-Prichard Oil Corp. v. Corporation Commission*[2] a proration order of the Commission restricted gas production from a 160-acre tract on the finding that only 57 acres of the tract were productive. Complainant appealed on the ground that the entire 160 acres were in fact productive and that the order as entered thus deprived it of property without due process of law. In sustaining the order the court acknowledged that, since confiscation of property was involved, the court was "authorized to exercise its own independent judgment as to the law and the facts."[3] Nevertheless, after noting that proration was within the police power of the state, the court held that no constitutional right was violated since the order was "supported by competent and substantial evidence."[4] It thus appears that, in spite of the express language of the statute calling for exercise of independent judg-

[1] OKLA. CONST. Art. 9, § 20.
[2] 205 Okla. 672, 241 P. 2d 363 (1951), *app. dism.*, 342 U.S. 938 (1952).
[3] 241 P. 2d at 368.
[4] 241 P. 2d at 372.

ment where constitutional issues are asserted, the court applied the substantial evidence rule.

Texas. Similar liberality has marked recent decisions of the Supreme Court of Texas in construing statutes governing judicial review of administrative decisions. In *Board of Water Engineers v. Colorado River Municipal Water District*[5] the court had before it the statute governing review of orders of the Board of Water Engineers, which provides in part as follows:

> In all such trials the burden of proof shall be upon the party complaining of such law, rules, regulations or orders or act of the Board and such law, rules, regulations or orders or act of the Board so complained of shall be deemed prima facie valid but the trial shall be de novo, and the court shall determine independently all issues of fact and of law with respect to the validity and reasonableness of the law, rules, regulations or orders or acts of the Board complained of.[6]

The court, speaking through Chief Justice Hickman, held that, notwithstanding the de novo provision in the statute, on judicial review the court was limited to the determination of whether the order was reasonably supported by substantial evidence.[7] This case is in line with previous decisions of the court construing de novo statutes as calling for review by the substantial evidence rule.[8]

Arkansas. In Arkansas a statute governing review of certain orders of the Public Service Commission provides that the supreme court shall not be bound by any finding of fact of the

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[5] ___Tex.___, 254 S.W. 2d 369 (1953).

[6] TEX. REV. CIV. STAT. (Vernon, 1950 Supp.) art. 7880-3c, § F.

[7] Judge Smedley dissented and stated his position in part as follows:

" 'De novo' alone strongly suggests that there shall be a trial anew, and when it is coupled with other words to the effect that the court shall determine all issues of fact and of law *independently*, a construction that such language means and intends that there shall be a limited trial under the substantial evidence rule is a constrained construction and is in my opinion unreasonable.... [T]he plain meaning of the statute is that the district court shall try the case de novo in the full sense of the term and 'determine independently all issues of fact'." 254 S.W. 2d at 375, 376.

[8] Harris, *A Reappraisal of the Substantial Evidence Rule in Texas Administrative Law,* 3 Southw. L. J. 416, 427, 431 (1949).

circuit court but shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable.[9] This statute has been construed as requiring a review de novo.[10] In *Chamber of Commerce of City of Hot Springs v. Chicago, Rock Island & Pac. Ry.*[11] the court limited the de novo requirement to method of trial rather than to scope of decision. The court said:

> It is our duty to try the cause *de novo* but not to reverse the Commission unless its findings are contrary to the weight of the evidence.[12]

This rule was applied although in Arkansas judicial review of administrative decisions is limited to the administrative record and is not based upon a new record adduced before the court.[13]

New Mexico. The courts in New Mexico are limited by statute to determining whether orders of the Corporation Commission are lawful and reasonable; if so, the court must affirm; if not, the court must reverse.[14] In a recent case[15] an attempt of a circuit court to amend an order of the Commission met with reversal in the supreme court on the ground that substitution of the judg-

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[9] ARK. STAT. 1947 ANN. §§ 73-133, 73-134. In Arkansas there is a second statute pertaining to methods of review of orders of the Public Service Commission. Section 73-233 limits the scope of review to determining whether the Commission acted within its authority or whether its action affected constitutional rights. This last statute was passed in 1935 along with the creation of the Department of Public Utilities. The former statute was enacted in 1921 and applied to review of orders of the Railroad Commission, which later became the Corporation Commission. In 1945 the Corporation Commission and the Department of Public Utilities were combined into the Public Service Commission, but the two methods of review were left the same.

[10] Missouri Pac. R. Co. v. Williams, 201 Ark. 895, 148 S.W. 2d 644 (1941).

[11] ___Ark.___, 249 S.W. 2d 8 (1952).

[12] 249 S.W. 2d at 9.

[13] Motor Truck Transfer, Inc. v. Southwestern Transp. Co., 197 Ark. 346, 122 S.W. 2d 471 (1938). The rule thus differs from that of Texas where de novo review has been construed as requiring a retrial of the facts in court. The Texas type of review is criticized in Comment, 2 Ark. L. Rev. 67, 73 (1947-48). It is said there, "There is no good reason why review upon the administrative record may not be made as effective as a review based upon a de novo hearing. It is a lawyer's business to preserve an adequate record and he can be as diligent in doing so before a Commission as before a court." The soundness of this argument, however, depends on whether or not a lawyer is retained.

[14] N. M. STAT. 1941 ANN. § 68-1363.

[15] Transcontinental Bus Lines v. State Corp. Com., 56 N. M. 158, 241 P. 2d 829 (1952).

ment of the court for the order of the Commission would constitute an unconstitutional exercise of legislative power by the judiciary. This result was reached in face of a statutory provision that every action to vacate or *amend* an order of the Commission must be filed in 90 days.[16] The court construed the statute as pertaining to the time limits for appeal and as having no effect upon judicial power.[17]

NECESSITY FOR ADMINISTRATIVE FINDINGS

Oklahoma. In Oklahoma the rule generally has been followed that orders of the State Industrial Commission must be supported by findings of fact,[18] and that where such findings are "too uncertain for judicial interpretation, an order based thereon will be vacated for further proceedings."[19] The rule recently was applied in *De Vore v. Maidt Plastering Co.*,[20] where the finding of a trial commissioner that the evidence was insufficient to show that the claimant sustained an accidental personal injury arising out of and in the course of his employment was held to be "too indefinite and uncertain for judicial interpretation and to form the basis of an order denying compensation."[21] The rule is an excellent one wherever judicial review is based upon an administrative record.[22] Under the prevailing Texas doctrine, in which

[16] N. M. STAT. 1941 ANN. § 68-1364.

[17] After determining that § 68-1363 only allows the courts to *set aside* or *vacate* an order on the ground that it is unlawful or unreasonable, the court held that the order of the Commission should have been set aside by the circuit court because of evident procedural errors by the Commission. The court determined that the Commission had not considered existing transportation facilities for which a certificate was sought (as required by §68-1308) and that the Commission had taken notice of outside evidence without entering it in the record.

[18] McCarthy v. Forbes Painting & Decorating Co., 200 Okla. 555, 198 P. 2d 212 (1948); Adams v. City of Anadarko, 198 Okla. 484, 180 P. 2d 159 (1947); Corzine v. Traders Compress, 196 Okla. 259, 164 P. 2d 625 (1945).

[19] Fischback & Moore, Inc. v. State Industrial Commission, 201 Okla. 170, 203 P. 2d 422, 425 (1949).

[20] 205 Okla. 612, 239 P. 2d 520 (1951).

[21] 239 P. 2d at 521.

[22] Wichita Railroad & Light Company v. Public Utilities Commission of Kansas, 260 U. S. 48 (1922).

evidence is received anew by the reviewing court,[23] there is less need for the rule. Generally, in Texas failure of an agency to make findings of fact will not be fatal to the order unless findings are expressly required by statute.[24]

VALUATION OF UTILITY PROPERTIES FOR RATE BASE PURPOSES

Arkansas. The Supreme Court of Arkansas recently approved original or book cost less depreciation reserve as a formula of valuation of public utility properties for rate purposes.[25] Although the many other tests which have been used for these purposes were considered by the court,[26] it was held that under the circumstances[27] the cost less depreciation formula was not unreasonable and did not result in confiscation of the utility's properties. The decision is an important one in the constant conflict between utilities and rate commissioners as to the proper method of appraising the value of properties for rate purposes. The court noted that whether original cost or cost of reproduction is more favorable to the utility will depend largely on whether the economic conditions prevailing at the time are inflationary or deflationary.

PRIMARY JURISDICTION

Arkansas. By statute[28] in Arkansas the Oil and Gas Commission has broad discretionary powers to prevent pollution of fresh

[23] Larson, *The Substantial Evidence Rule: Texas Version,* 5 Southw. L. J. 152, 153 (1951).

[24] Note, 6 Southw. L. J. 284 (1952); TEX. REV. CIV. STAT. (Vernon, 1948) art. 911 b, § 5a (d). In Texas the Railroad Commission is required by statute to make specific findings of fact, for failure of which orders become void (but not absolutely void so as to be subject to a collateral attack), whereas in Oklahoma only the court requires specific findings of fact be set forth, for failure of which the order will be vacated.

[25] City of Ft. Smith v. Southwestern Bell Telephone Co., ...Ark......, 247 S.W. 2d 474 (1952).

[26] The tests mentioned were (a) original cost, (b) the cost of reproduction, (c) outstanding capitalization, (d) present value, (e) prudent investments and (f) net earnings. *Id.* at 482.

[27] The cost was determined by the Commission as of December 31, 1950; the court modified this part, ordering that the Commission determine the cost as of September 30, 1950. *Id.* at 481.

[28] ARK. STAT. 1947 ANN. § 53-101 *et seq.*

waters. In *Spartan Drilling Co. v. Bull*[29] a group of home owners brought an action in equity to prevent Spartan Drilling Company from polluting their streams and creating a nuisance. Spartan contended that since primary jurisdiction was vested in the Commission by statute, the equity court was without jurisdiction to hear the complaint. The court held that nothing in the statute revealed that the legislature intended jurisdiction of the Commission to be exclusive or that courts of equity should be deprived of their inherent powers to abate nuisances, and that it was immaterial whether the Commission had attempted to regulate the water in controversy.

The doctrine of primary jurisdiction was developed principally in rate cases where uniformity of action is of particular importance.[30] The factual situation in the instant case is non-recurrent and does not require constant regulation. There is clearly less need for application of the doctrine of primary jurisdiction. Not considered by the court was the interesting question whether the enjoining of pollution is a proceeding so inherently judicial in nature as to be beyond the power of the legislature to delegate to an administrative agency.[31]

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29 ......Ark......., 252 S.W. 2d 408 (1952).

30 In Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 448 (1907), in spite of a statute clearly allowing a complainant to institute a suit on his own behalf, the Supreme Court required that a person seeking redress from unreasonable rates first complain to the Interstate Commerce Commission, "which body alone is vested with power originally to entertain proceedings for the alteration of an established [rate] schedule." Further distinction between the two situations may be that the determination of whether water has been polluted is far less complex than the determination of whether rates are reasonable or are so low as to be confiscatory.

31 See discussion in Harris, *The Administrative Law of Texas*, 29 Tex. L. Rev. 213, 217 (1950).