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ADMINISTRATIVE LAW

by

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THE Texas courts of civil appeals during the past year decided over one hundred cases involving issues of administrative law. Because of the volume of decisions during the survey period, only the most important cases have been selected for discussion in order to avoid unnecessary repetition. As in previous *Surveys*,[1] the classifications of these decisions are as follows: constitutional considerations, administrative adjudications, and judicial review, the latter being further subdivided into statutory interpretation and substantial evidence catagories.

I. CONSTITUTIONAL CONSIDERATIONS

Right To Confront and Cross-Examine Witnesses. The Texas Court of Civil Appeals at Austin recently held that in a proceeding to determine the initiation of welfare assistance due process requires that a party be given the opportunity to confront and cross-examine adverse witnesses.[2] The court stated that in order to satisfy due process requirements, the party seeking medical welfare assistance should be furnished copies of the medical reports relied upon by the Texas State Department of Public Welfare, *and* that the person or persons who made the prehearing determination regarding the applicant's eligibility for benefits should be made available for examination by the applicant.

Leroy Wilson applied to the Department of Public Welfare for assistance, and, in accordance with the Department's customary procedure, was examined by a physician and interviewed by a social worker. The reports of these persons were then submitted to the Medical Services Division of the Department for evaluation. At this point Wilson's application for aid was denied. Wilson then requested a "fair hearing" as provided for by the procedures set up by the Department. At the hearing additional evidence was produced on the issue of Wilson's eligibility for assistance, and the hearing officer adjourned the hearing and submitted this evidence to the Medical Services Division. The Division recommended that Wilson be examined by a second physician, Dr. Lowry, and after this examination the Division again found that Wilson was ineligible for benifits. The hearing was reconvened, and Wilson's attorney requested inspection of the report of Dr. Lowry. This request was denied by the hearing officer, although a part of Dr. Lowry's report was read at the hearing.

Wilson appealed to the district court, and he obtained a summary judgment, which provided that he be granted a "new and fair hearing consistent with Due Process of Law."[3] The order further directed that if the Department based "its final decision or order in whole or in part on written reports which are pre-

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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); Guinn, *Administrative Law, Annual Survey of Texas Law*, 25 SW. L.J. 201 (1971).

[2] Wilson v. Hackney, 468 S.W.2d 935 (Tex. Civ. App.—Austin 1971).

[3] *Id.* at 936.

sented and considered at the hearing, the Defendant (Department) is *not* required to compel the attendance at such hearing of those persons who prepared such reports so as to afford the Plaintiff or his representative the right to confront and examine such persons."[4] This was the only portion of the trial court's order that Wilson assigned as error.

On appeal to the court of civil appeals, Wilson contended that he was denied procedural due process in violation of the fourteenth amendment to the United States Constitution in that he was not afforded an opportunity to confront and cross-examine persons who made the determination regarding his eligibility for welfare assistance—*i.e.*, the Medical Services Division—especially since the hearing officer relied upon the report of these persons in making the administrative determination. The Welfare Department, on the other hand, argued that because the Public Welfare Act[5] contains no provision authorizing the Department to subpoena witnesses, "its inability to compel the attendance of witnesses at hearings and that the additional expense involved in paying witness fees justify its not making available at the hearing those persons."[6]

The court of civil appeals held that Wilson had been denied procedural due process. Citing *Goldberg v. Kelly*,[7] the court pointed out that "[d]ue process requires an opportunity in an administrative hearing of this character to confront and cross-examine adverse witnesses."[8] The fact that the issue in *Goldberg* related to the termination of welfare assistance, rather than initiation of such aid, was held to be immaterial on the theory that "the rejected applicant is in need of the protection of confrontation as much as is the recipient threatened with termination. The quality of the hearing afforded to appellant at the administrative level is especially important since ordinarily those persons in appellant's position will have no right to judicial review of the evidentiary decisions of the Hearing Officer."[9]

In order to satisfy due process requirements, the applicant for welfare assistance must be furnished copies of the medical reports *and* be allowed the opportunity to confront the persons in the Medical Services Division who determined ineligibility.[10] However, at this point the court placed a limitation upon this

[4] *Id.* at 937 (emphasis added). The trial court listed six elements that the hearing should provide, although Wilson only urged error on the confrontation issue. The court of civil appeals had reservations concerning the jurisdiction of the trial court to "declare the elements of a 'Fair Hearing' at the administrative level" based upon decisions that "judicial power does not embrace the giving of advisory opinions." *Id.* at 937. However, the court decided to pass upon Wilson's point of error based upon the order of the trial court, irrespective of the existence or nonexistence of jurisdictional power, in the interest of justice.

[5] TEX. REV. CIV. STAT. ANN. art. 695c, § 16-B (1964).

[6] 468 S.W.2d at 938.

[7] 397 U.S. 254 (1970).

[8] 468 S.W.2d at 938.

[9] *Id.*

[10] The court found that the Department's "Form 20," titled "Statement of Appellant's Rights in Hearing Proceedings," required this result. "Form 20" provides in part:

> The appellant and/or his legal representative are entitled to examine, prior to the hearing, the material that will be introduced as evidence and to examine all documentary evidence used during the hearing, to bring witnesses, to establish all pertinent facts and circumstances, and to advance any argument, and to question or refute any testimony or evidence.

Id. The court also pointed out that the confrontation should be with the persons connected with the Division, rather than with the physicians, since it is the Division that makes the subjective judgment of eligibility. *Id.*

right of confrontation by adding that the persons in the Division need not be present at the hearing for cross-examination. Instead, the court suggested that the applicant be allowed to examine these persons at a prehearing conference or by the use of discovery procedures. In order to reduce the Department's costs, the record at the prehearing conference or the evidence adduced by discovery is then the substantive evidence used at the hearing.[11]

This case appears to be in accord with the view of Professor Davis, that when "adjudicative facts" are involved, the litigant in an administrative hearing should be entitled to a "trial-type" hearing with ample opportunity for confrontation and cross-examination. Adjudicative facts are the facts about the parties and their activities, business, and property, which usually answer the questions of who did what, where, when, how, and with what motive or intent.[12]

Municipal Licensing Fees. In *City of Corpus Christi v. Gilley*[13] the court of civil appeals held that a city cannot require taxicab drivers to pay a fee as a prerequisite to the issuance of a chauffeur's license. Gilley brought suit, individually and as a representative of all taxicab drivers in the city, against Corpus Christi for a declaratory judgment and injunctive relief. The trial court entered a temporary injunction against the city, and the court of civil appeals affirmed, holding the ordinance void.[14] The case was then tried on the merits and the trial court entered a permanent injunction and declared the fee provision in the ordinance invalid. The city then perfected its appeal.

The state of Texas collects a fee from all persons who wish to drive commercial vehicles.[15] A city has no right to impose an additional fee for a city chauffeur's license. Although the court recognized that a city does have the right to license taxicab drivers or to impose reasonable restrictions upon the issuance of a license in the exercise of its police powers, a city is prohibited by statute from levying any occupation tax or license fees on such motor vehicles.[16] Therefore, once the operator of a commercial vehicle has paid the fee to the state and received his license, he has a right to operate his vehicle, subject to reasonable restrictions imposed by a city. A city cannot, however, require such a driver to pay an additional fee and obtain a city chauffeur's license as a second prerequisite to the operation of a commercial vehicle.

Due Process—Absence of Board Member. The fact that one member of the State Banking Board is absent when the Board grants a charter to a bank, does not violate due process—especially when an opposing bank voluntarily chooses to submit its case to the Board, absent one member.

Three banks were involved in *Bank of North America v. State Banking Board*:[17] Southeast Bank, Bank of North America, and the Texas Commerce Bank. Early in 1969 Southeast Bank had applied for a charter to operate in

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[11] *Id.*
[12] 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958).
[13] 458 S.W.2d 124 (Tex. Civ. App.—Corpus Christi 1970), *error ref. n.r.e.*
[14] 379 S.W.2d 84 (Tex. Civ. App.—Corpus Christi 1964), *error ref. n.r.e.*
[15] TEX. REV. CIV. STAT. ANN. art. 6687b (1969).
[16] *Id.* art. 6698 (1969).
[17] 468 S.W.2d 529 (Tex. Civ. App.—Austin 1971).

Houston. Shortly thereafter the Bank of North America applied for permission to move its bank at or very near the location specified by Southeast. In April 1969, both applications were denied by the Board, and no appeal was taken. Subsequently in 1969 Southeast again filed for a charter at the same location, and North America again requested permission to relocate. The Board heard Southeast's application, along with North America's opposition thereto, and on August 12, 1970, the Board approved the charter of Southeast Bank.

North America sought a temporary injunction against the issuance of the charter, which was refused by the district court. North America then appealed to the court of civil appeals. The court of civil appeals rejected all of North America's contentions and affirmed the district court's action in refusing to enter the temporary injunction. North America argued that Southeast was only a branch of the Texas Commerce Bank and that the issuance of the charter to Southeast Bank violated article XVI, section 16 of the Texas Constitution, which basically provides that a bank cannot engage in business at more than one location.[18] The court disposed of this contention on the basis that North America had not produced enough proof that the ownership of Southeast and the Texas Commerce Bank was the same. Since the issue was one of fact with respect to which the appellant had failed to meet his burden of proof, the findings of the Board could not be overturned.

North America also contended that fundamental due process had been violated because the constitution of the State Banking Board at the hearing was different from the constitution on the date of the approval of Southeast's charter. At the hearing two Board members were present, and a substitute, Stewart, attended the hearing for the absent member, Falkner. When the charter was approved, however, Falkner was no longer on the Board, and Stewart had been appointed. Stewart abstained from voting on the charter application. Relying upon Professor Davis,[19] the Austin court of civil appeals held that due process was not violated because administrative board members are *not* required to be present at a hearing, provided that three safeguards are observed:

(1) deciding officers must consider the evidence,
(2) that a quorum must be present when the decision is made, and
(3) that the presiding officer who sees and hears the witnesses testify must make an initial or recommended decision or a report on the demeanor of witnesses whenever demeanor may be a substantial factor.[20]

In distinguishing *Webster v. Texas & Pacific Motor Transport Co.*,[21] relied upon by North America, the court pointed out that in that case two members of the Railroad Commission had an informal, unscheduled meeting without notice to the third member. In the present appeal, however, there was a regularly scheduled meeting and notice had been given to all Board members. Therefore, in addition to the requirements listed by Professor Davis, two more have apparently been added by the court: (1) that there be a regularly scheduled board meeting; and (2) that notice be given to all board members.

[18] TEX. CONST. art. XVI, § 16.
[19] 2 K. DAVIS, *supra* note 12, at § 11.20.
[20] 468 S.W.2d at 533-34.
[21] 140 Tex. 131, 166 S.W.2d 75 (1942).

The court also placed some emphasis upon the fact that North America proceeded to oppose the charter application despite the absence of one member of the Board: "Appellant [North America] was well aware at the time of the hearing that Commissioner Falkner was absent, and the record is silent as to any effort on its part to postpone the hearing. Appellant voluntarily chose to submit its case to the Board absent Falkner, and it will not now be heard to complain of his absence."[22]

II. ADMINISTRATIVE ADJUDICATION

Mootness. The Beaumont court of civil appeals in *Texas Alcoholic Beverage Comm'n v. Carlin*[23] dismissed the case as moot, finding no actual controversy. Carlin had been issued a Wine and Beer Retailer's Permit and a Retail Dealer's On-Premise Late Hours License, both of which were suspended by the Commission for a fifteen-day period, beginning on June 22, 1970. On June 18, 1970, Carlin brought suit in a district court to set aside that suspension order. The district court issued an *ex parte* order staying the order of the Commission "during the pendency of this suit or until a final determination of this cause."[24] The Commission moved to dismiss for want of jurisdiction. The motion was overruled, and thereafter the Commission refused to participate in the proceedings in the district court. The court then set aside the Commission's order.

The court of civil appeals held that the case was moot and reversed the trial court and dismissed, since the fifteen-day suspension period had expired before the case was tried in the district court. The Commission relied upon *Department of Public Safety v. Austin*[25] in arguing that the controversy was not moot. In that case a statute provided that an order of the Department was suspended until final judgment had been rendered.[26] Since the district court in the present case had stayed the order, the Commission contended that there was still an actual controversy because the suspension order had not in fact been executed. The court, however, disposed of this contention on two grounds. First, unlike *Austin*, in *Carlin* there was no *statutory* authority for suspending the order until a final judgment was rendered; the Liquor Control Act[27] has no comparable provision. Secondly, in *Carlin* the order contained a *specific period* of suspension beginning on a specified date.

Therefore, when dealing with a suspension order of the Texas Alcoholic Beverage Commission that contains a specific period of suspension, the case must be litigated before such period has expired, or the case will be held to be moot. This seems to put the licensee in a favorable position, because if he can obtain a stay order from the district court, as Carlin did in this case, and the period of suspension then passes before the case is heard, the Commission has nothing to appeal, and the licensee has not had his privileges effectively suspended.

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[22] 468 S.W.2d at 534.
[23] 468 S.W.2d 521 (Tex. Civ. App.—Beaumont 1971).
[24] *Id.* at 521.
[25] 163 Tex. 280, 354 S.W.2d 376 (1962).
[26] TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(c) (1969).
[27] TEX. PEN. CODE ANN. arts. 666-1 to 667-33 (Supp. 1972).

Exhaustion. In a recent case a teacher brought an independent suit in a district court for specific performance of her teaching contract or for damages for breach of this contract and for damages for the unconstitutional treatment she received in being dismissed.[28] The Austin court of civil appeals held that the suit could be maintained and that the plaintiff did not, under the facts, have to exhaust her administrative remedies by first appealing to the State Commissioner of Education or the State Board of Education.

The plaintiff entered into a "probationary contract" with the Eanes Independent School District for the 1969-70 school year. Paragraph five of her contract[29] provided that the teacher's employment could be terminated if notice of intention to terminate was given by April 1. If no notice was given, then the teacher was to be considered as having been rehired. This paragraph in the contract was substantially similar to section 21.203 of the Texas Education Code.[30] However, it was not until April 30, 1970, that the school board voted not to renew the plaintiff's contract. She was notified of this decision on May 4, 1970. In accordance with paragraph six of her contract,[31] the plaintiff requested a

[28] Cummins v. Board of Trustees, 468 S.W.2d 913 (Tex. Civ. App.—Ausin 1971).

[29] Paragraph five of the contract read as follows:

> The Employer may terminate the employment of the Teacher at the end of the contract period set forth herein, if, in the judgment of the Employer, the best interest of the School District will be served. Provided, however, notice of intention to terminate the employment shall be given by the Employer to the Teacher on or before the 1st day of April preceding the end of the employment fixed herein. In the event of failure by the Employer to give notice to the Teacher of its intention to terminate by the 1st day of April preceding the end of the employment fixed herein the Employer shall be deemed to have elected to employ the Teacher in the same capacity and under probationary contract status for the succeeding school year.

Id. at 915.

[30] TEX. EDUC. CODE ANN. § 21.203 (1969):

> Probationary Contract—Termination
>
> The board of trustees of any school district may terminate the employment of any teacher holding a probationary contract at the end of the contract period, if in their judgment the best interests of the school district will be served thereby; provided, that notice of intention to terminate the employment shall be given by the board of trustees to the teacher on or before April 1, preceding the end of the employment term fixed in the contract. In event of failure to give such notice of intention to terminate within the time above specified, the board of trustees shall thereby elect to employ such probationary teacher in the same capacity, and under probationary contract status for the succeeding school year if the teacher has been employed by such district for less than three successive school years, or in a continuing position if such teacher has been employed during three consecutive school years.

[31] Paragraph six of the contract read as follows:

> In the event that the Teacher is notified by the Employer of its intention to terminate the Teacher's employment at the end of the contract period set forth herein, the Teacher shall have the right, upon written request filed within ten (10) days after such notification, to a hearing before the Employer, and at such hearing the Teacher shall be given reasons for termination of his or her employment. After such hearing, the Employer may confirm or revoke its previous action of termination, but in any event, *the decision of the Employer shall be final and nonappealable.*

468 S.W.2d at 915 (emphasis added). TEXAS EDUC. CODE ANN. § 21.204 (1969) is very similar in wording. It provides:

> Hearing.
>
> In event a teacher holding a probationary contract is notified of the intention of the board of trustees to terminate his employment at the end of his current contract period, he shall have a right upon written request to a hearing before the board of trustees, and at such hearing, the teacher shall be given the reasons for termination of his employment. After such hearing, the board of trustees may confirm or revoke its previous action of termination; but in

hearing so that she could be given the reasons for her termination. On June 15, 1970, a hearing was held, and the Board reaffirmed its previous decision. The plaintiff then filed her independent suit on June 18, 1970.

The trial court sustained the school district's plea in abatement and dismissed, because the teacher had failed to exhaust her administrative remedies of appeal to the state educational authorities. The court of civil appeals, however, reversed and remanded for a trial on the merits, holding that there was no need to exhaust administrative remedies. First, both the contract in question and the similar statute[32] expressly prohibited appeals after the requested hearing had been held. The court interpreted this "as prohibiting only appeals to State administrative authorities and not as denying independent suits such as this for breach of contract and for deprivation of constitutional rights. Otherwise, this provision of the statute is unconstitutional."[33] Secondly, the court held that the plaintiff was not required to appeal to the educational agencies because only a question of law was involved. She was not claiming that she had been *wrongfully* discharged, but rather she was relying upon the provision in her contract that provided for automatic renewal if notice of termination was not given by April 1.

According to Professor Davis, exhaustion of administrative remedies is not required in three general instances: (1) when there is an attack upon the jurisdiction of the agency; (2) when the litigant challenges the basic constitutionality of the agency's enabling act; and (3) when the agency remedy is inadequate, when a question of law is involved, or when review of the agency decision would be futile.[34]

Validity of the Agency's Order. During the past year two civil appeals cases of primary importance dealt with the validity of an order issued by an administrative agency. Both cases held that to be valid, the order of such an agency must comply with statutory procedural requirements.

In *Gonzales County Savings & Loan Ass'n v. Lewis*[35] the Savings and Loan Commissioner approved the application of South Texas Savings and Loan Association of Victoria County to establish a branch office in Lavaca County. Gonzales County Savings and Loan Association contested this approval on the basis that the Commissioner's order was invalid for noncompliance with the Texas Savings and Loan Act, in that the order did not contain a "concise and explicit statement of the underlying facts supporting the findings."[36] The order stated:

> The Commissioner further finds the following: that the aggregate amount of the loss reserves, surplus and Permanent Reserve Fund stock of the applying association is equal to at least three per cent (3%) of its savings liabilities;

any event, the decision of the board of trustees shall be final and non-appealable.

[32] TEX. EDUC. CODE ANN. § 21.203 (1969); *see supra* note 30.

[33] 468 S.W.2d at 916.

[34] 3 K. DAVIS, *supra* note 12, at §§ 20.01-.10.

[35] 461 S.W.2d 215 (Tex. Civ. App.—Austin 1970), *error granted.*

[36] TEX. REV. CIV. STAT. ANN. art. 852a, § 11.11(4) (1963):

> A decision or order adverse to a party who has appeared and participated in a hearing shall be in writing and shall include findings of fact and conclusions of law, separately stated, on all issues material to the decision reached. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

that the applying association has had a profitable operation for the three-year period next preceding the filing of such application after paying operating expenses, making statutory allocations to loss reserves and paying dividends on savings accounts out of its earnings during such period; that the applying association has had no serious supervisory problems which would affect its ability to properly operate such office; . . . that the proposed branch office will be supervised by qualified full-time management; and that the character, responsibility, and general fitness of the management of the branch applicant are such as to command confidence and warrant belief that the business of the proposed branch office will be honestly and efficiently conducted in accordance with the intent and purpose of the Savings and Loan Act.[37]

The court of civil appeals held that the recitals of mere conclusions by the Commissioner did not meet the requirements of the statute and refused to sustain the order since it did not comply with statutory rules. The court pointed out that the statute had several functions: "to restrain any disposition on the part of the Commission to grant a certificate without a full consideration of the evidence and a serious appraisal of the facts . . . to inform protestants of the facts found so that they may intelligently prepare and present an appeal . . . to assist the courts in properly exercising their function of reviewing the order."[38] Also interesting to note is the language by the court which indicates that even if there is evidence in the record which will sustain the conclusions in the order, the order will, nevertheless, be invalid. The court held that this fact does not serve to relieve the Commissioner of his duty to comply with the statute and rules.[39]

In *Lewis v. Colorado County Federal Savings & Loan Ass'n*[40] the Savings and Loan Commissioner granted authority to South Central Savings Association of Brenham to set up an "agency" in Fayette County. In his order the Commissioner complied with the rules relating to agencies.[41] However, he did not comply

[37] 461 S.W.2d at 216-17. The Commissioner's order in this case tracked the statutory language of rule 2.4 of the RULES AND REGULATIONS FOR SAVINGS AND LOAN ASSOCIATIONS and TEX. REV. CIV. STAT. ANN. art. 852a, § 2.08(2) (1964).

[38] 461 S.W.2d at 218.

[39] *Id.* at 219.

[40] 456 S.W.2d 445 (Tex. Civ. App.—Austin 1970), *error ref. n.r.e.*

[41] Rules 3.1-.3 of the RULES AND REGULATIONS FOR SAVINGS AND LOAN ASSOCIATIONS:

> 3.1. An association may, without approval of the Commissioner, appoint an agent or agents, whose functions shall be limited to the receipt of applications for loans, the servicing of loans and contracts, or to the management or sale of real estate owned by the association, provided such agent is a "mortgagee" qualified and approved by the Federal Housing Administration. In addition, an association may appoint other persons as agent to perform such limited functions provided that the proposed agent meets the qualifications set forth in 1.11 hereof and the Commissioner approves the proposed agent as to character, responsibility and general fitness to conduct such business for the association and the contractual arrangement between the association and the agent. 'Agency' means any lawful arrangement whereby any business of an association is conducted other than by regularly employed personnel of the association. An agent appointed under the authority of this section shall not receive payments on new or established savings accounts or pay out withdrawals of monies from savings accounts, nor shall he perform any duties for the association other than those specifically authorized herein. The restrictions placed on the authority of an agent by this section will not prohibit the board of directors of an association from otherwise appointing and designating such agent as an appraiser for the association.
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> 3.2. Agencies for receiving savings for and on behalf of an association, including applications for new accounts, in addition to performing the func-

with rule 2.4(f) with respect to applications for branch offices.[42] The order also failed to state that there was a "public need"[43] for the facility requested by South Central. Both the trial court and the court of civil appeals held that the Commissioner's order was invalid and set aside the grant of authority to South Central. The Commissioner must apply the same standards to applications for an "agency" as are applicable to applications for a charter or a branch office. The court stated that public policy required this result because the objectives of all three are basically the same. Thus, in *Lewis* even though the Commissioner complied with statutory requirements and standards for an "agency," which was what had been requested, the court found that he had to further comply with the statutory standards for approving branch offices. The court required this compliance even though the Commissioner had no way of knowing in this particular case that both standards did in fact have to be followed.

Finality of Agency's Orders—Estoppel By Failure to Comply with Rules and Statutes. In *Inman v. Railroad Commission*[44] the hearing examiner for the Railroad Commission recommended the granting of nine out of twenty-eight applications to carry certain agricultural products in their natural state within the state. The examiner's report stated that there were "inadequacies of services offered." The Commission accepted the examiner's recommendation and issued its orders substantially in the form recommended by the examiner. Then the Commission issued certificates, cab cards, and places to each of the nine applicants after each had filed the required insurance and paid the fees. Inman and several other carriers had unsuccessfully opposed these applications before the

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tions allowed in 3.1 above may be established with the prior approval of the Commissioner upon a finding that:

(a) the character, responsibility and general fitness of the proposed agent are such as to command confidence and warrant belief that the business of the association to be conducted by such agent will be honestly and efficiently handled; and

(b) the proposed operation will not unduly harm any other association operating in the vicinity of the proposed location; and

(c) the procedure to be followed in regard to the safeguarding of funds belonging to the applying association is adequate.

3.3. Applications for permission to establish the type agencies described in 3.2 shall state the proposed location thereof; the need therefor; the functions to be performed; the personnel and facilities to be provided; and such other information as to clearly show the nature of the proposed operation; . . . .

[42] Rule 2.4 of the RULES AND REGULATIONS FOR SAVINGS AND LOAN ASSOCIATIONS provides in part:

2.4. The Commissioner shall approve an application for a branch office if he shall have affirmatively found from the data furnished with the application, the evidence adduced at the hearing and his official records that: . . . (f) the proposed location of the additional office is within the same county as the principal or home office of the applying association except in cases where it appears that the proposed additional office is to be in a different county from that in which the principal or home office of the applying association is located and there is no other association, either State or Federal, adequately serving the community in which such additional office is to be located; . . . .

[43] In a footnote the court referred to the definition given by the Texas Supreme Court in Gerst v. Nixon, 411 S.W.2d 350, 358 (1967): "[A] substantial or obvious community need for the proposed association in the light of attendant circumstances, as distinguished from a mere convenience on the one hand and an absolute or indispensable need on the other."

[44] 464 S.W.2d 895 (Tex. Civ. App.—Austin 1971), *error ref. n.r.e.*

Commission by filing objections and exceptions to the examiner's recommendation. At this point Inman and eight other motor carriers filed separate suits in district court to enjoin the trucking operations authorized by the Railroad Commission's order. The carriers that had been granted the permits by the Commission filed a plea in abatement on the grounds that Inman and the others had failed to exhaust their administrative remedies before the Commission by not objecting to the form of the order, and that, secondly, the order of the commission was not final. The trial court sustained these pleas and dismissed the suits.

The court of civil appeals held that the orders were final, that Inman and the other carriers had not failed to exhaust their administrative remedies, and that, therefore, their suit was timely. The order of the hearing examiner was defective in that it did not clearly set out findings of fact,[45] and the order of the Commission carried forward this defect. However, since the order of the Commission was immediately effective, put into operation by the nine carriers who received the authorization, and such operation infringed upon the rights of Inman and the other carriers, the court held that the right of appeal attached immediately.[46] Quoting from another case,[47] the court stated that the nine carriers here were estopped to assert that the order which operated to their advantage was not final. Under these facts there was no need for the contestants to the applications to seek a rehearing before the Commission.[48]

The nine carriers also relied upon Commission rules 48 and 49 to sustain the trial court's plea in abatement. Rule 48 requires that Commission orders "incorporate the findings of fact and ultimate conclusions required by law, either in the body of the order or by reference to the examiner's report . . . ."[49] Rule 49 provides that administrative finality occurs upon the adoption of the examiner's report and recommended order by the Commission, or when a petition for reconsideration is allowed or overruled by operation of law. The latter rule also provides that "[n]o certificate or permit shall be issued in any proceeding until administrative finality is attained."[50] The court pointed out that in this case the Commission did not adopt the examiner's report, but instead issued its own order, similar to that recommended by the examiner, and then issued certificates "as though administrative finality had been attained."[51] Therefore, the court held that the Commission was estopped to show lack of finality through its own noncompliance with its rules in order "to defeat the right of appeal of adversely interested parties whose rights are prejudiced by the orders made immediately effective by the Commission and acted upon by the parties favored by the orders."[52]

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[45] TEX. REV. CIV. STAT. ANN. art. 911b, § 5a(d) (1964).

[46] 464 S.W.2d at 899.

[47] Thomas v. Stanolind Oil & Gas Co., 188 S.W.2d 418, 422 (Tex. Civ. App.—Austin 1945), *rev'd on other grounds*, 145 Tex. 270, 198 S.W.2d 420 (1946).

[48] RULES AND REGULATIONS OF THE RAILROAD COMMISSION rule 50 provides in part:

> In any proceeding where the order of the Commission is contrary to the ultimate conclusions of the examiner's report and recommended order, and only in such proceedings, a petition for reconsideration may be filed within twenty days after the service upon the parties of the Commission's final order . . . .

[49] 464 S.W.2d at 900.

[50] *Id.*

[51] *Id.*

[52] *Id.*

Mandamus Improper Remedy to Compel Administrative Agency's Performance of Discretionary Function. In *Hereford v. Farrar*[53] the Texas State Board of Examiners of Psychologists refused to issue a license to Farrar. Farrar had applied for certification without having taken an examination on the basis that he had a Master of Education Degree in Counseling Psychology along with eight years of professional psychological experience.[54] The Board concluded that Farrar's degree was not primarily psychological, but educational.

Farrar then brought a mandamus proceeding in district court to compel the Board to issue him a license. The trial court ordered that the license be issued, but the court of civil appeals reversed and rendered judgment in favor of the Board. The court pointed out that as a general rule mandamus is not the proper remedy to compel performance of a discretionary function. However, if the administrative agency has clearly abused its discretion, and if there is no adequate remedy at law, an exception to the above rule may be recognized.[55] Here there was no abuse of discretion, and Farrar was not without an adequate remedy at law. He should have sought a hearing or rehearing before the Board to obtain an adverse ruling in order to establish a basis for judicial review. Farrar, at the present stage of the litigation, had nothing to complain about in the courts.

III. JUDICIAL REVIEW

Statutory Interpretation. In *Johnson v. McDaniel*[56] the plaintiff, McDaniel, owned and operated a retail liquor store approximately one block from the defendant's retail grocery and liquor store. The defendant's permit, however, specified that alcoholic beverages were to be sold only in a part of his building. There was no physical partition or division between the defendant's two businesses, and there was a common entrance. McDaniel brought suit for damages and an injunction for defendant's alleged illegal operation of the liquor store. The district court awarded damages and granted a permanent injunction. In affirming the trial court's judgment, the Eastland court of civil appeals specified that the issue was whether the sale of alcoholic beverages had to be carried on as a segregated business in contrast to being operated with a nonregulated business under the same roof. To arrive at the answer the court had to interpret several enactments.

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[53] 469 S.W.2d 16 (Tex. Civ. App.—Austin 1971).

[54] TEX. REV. CIV. STAT. ANN. art. 4512c, § 15(b) (1966) provides:

> Until December 31, 1970 a person who is at least twenty-one years of age, a resident of this state, of good moral character, and is a citizen of the United States or has legally declared his intention of becoming a citizen may, upon application and payment of the certification fee, be certified without examination by the Board as a psychologist if
>
> (1) he has a doctor's degree from an accredited institution based upon a program which is primarily psychological or the substantial equivalent thereof in both subject and extent of training, and, in addition, has had three years of professional experience satisfactory to the Board, or
>
> (2) has a master's degree from an accredited institution based upon a program which is primarily psychological and, in addition, has had eight years of professional psychological experience.

[55] 469 S.W.2d at 18.

[56] 461 S.W.2d 198 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.*

First, the history of the word "premise" as used by the Liquor Control Act[57] was traced. Between 1937 and 1959 "premises" that were required to be licensed included all adjacent premises.[58] In 1959 section 3a(7) of the Liquor Control Act was amended, and the Liquor Control Board was given discretion in determining what portion of the premises were to be licensed.[59] But an administrative regulation promulgated in 1965 announced that "it shall be the policy of the Administrator that the licensed premises shall include all adjacent and contiguous mercantile establishments or businesses in the same building as the permittee's alcoholic beverage business."[60] In 1967 the legislature attempted to reflect this administrative change by passing a statute, but it was subsequently vetoed.[61] Two years later Senate Bill 27 and House Bill 1440 were passed.[62] These bills were the primary issues in the controversy. Senate Bill 27 provided that "premise" included an area no smaller than was defined by the 1935 Liquor Control Act.[63] The court said this evidenced the intent of the legislature to return to the original definition, which would include an entire building and, hence, prohibit licensing of only a portion of a building. The defendant also agreed with this interpretation. The next problem was to reconcile Senate Bill 27 with House Bill 1440. The latter was identical to Senate Bill 27 except for the words "as amended," which appeared at the end of the House Bill. The defendant argued that the addition of these words encompassed the 1959 amendment to the Liquor Control Act and that, therefore, the entire building need not be licensed according to the discretionary approval of the Liquor Control Board.

The court quickly disposed of this contention by reading "as amended" into the Senate Bill so as to include the 1937 amendment to the Act, because prior to that time there was no definition of "premise" in the Act. The court reasoned that since it must be presumed that the legislature intends to change the state of existing law when it amends that law, the 1969 amendments must be construed so as to define "premise" as it was in 1937. Otherwise, if the defendant's contention were correct, the 1969 amendment would have made no change in existing law.

A case involving the suspension of an attorney's license to practice law gave the Eastland court of civil appeals an opportunity to interpret article 320a-1(6) of the State Bar Act and the 1969 amendment thereto.[64] Bryant, a licensed at-

[57] TEX. PEN. CODE ANN. arts. 666-1 to 667-33 (Supp. 1972).

[58] 461 S.W.2d at 200.

[59] TEX. PEN. CODE ANN. art. 666-3a(7) (Supp. 1972).

[60] Liquor Control Board, Administrative Regulation under Section 3a(7) of the Liquor Control Act (1965).

[61] 461 S.W.2d at 200.

[62] Senate Bill 27, ch. 38, § 16A, [1969] Tex. Laws 80 (codified at TEX. PEN. CODE ANN. art. 666-18 (Supp. 1972), provided in part as follows:

> No applicant for a Package Store Permit or a renewal thereof shall have authority to designate as 'premise' and the Board or Administrators shall not approve a lesser area than that specifically defined as 'premise' in Section 3a(7) of Article I of the Texas Liquor Control Act as enacted by the 44th Legislature, 2nd Called Session, 1935.

House Bill 1440, ch. 819, § 1, [1969] Tex. Laws 2451 (*also* codified at TEX. PEN. CODE ANN. art. 666-18 (Supp. 1972), contained the same sentence, with the addition of "as amended" at the end.

[63] Ch. 467, § 3, [1935] Tex. Laws 1795.

[64] Bryant v. State, 457 S.W.2d 72 (Tex. Civ. App.—Eastland 1970), *error ref. n.r.e.*

torney, was convicted of a felony involving moral turpitude in a federal district court. While the appeal from that conviction was pending, the State Bar of Texas, through its grievance committee, brought suit to suspend Bryant's license during the appeal. Bryant's primary contention was that the 1969 amendment to article 320a-1(6)[65] was unconstitutional in that it violated article III, section 35 of the Texas Constitution, which provides that "no bill shall contain more than one subject, which shall be expressed in its title." He argued that prior to the 1969 amendment section 6 was a venue statute, providing for disbarment proceedings in the district court in the county of the attorney's residence. In 1969, however, the section was amended to provide: (1) for the suspension of an attorney's license during the pendency of an appeal from a conviction of a felony involving moral turpitude; (2) disbarment during any period of probation following such a conviction; and (3) disbarment upon a final conviction of such felony.[66] The caption of the amendment read: "An Act amending the State Bar Act; amending Section 6, Chapter 1, page 64, General Laws, Acts of the 46th Legislature, 1939 (Article 320a-1, Vernon's Texas Civil Statutes); and declaring an emergency."[67] Byrant argued that substantive changes were made to section 6 in 1969, none of which were reflected in the caption, and that the 1969 changes were more than mere venue provisions.

The court held the amendment constitutional and affirmed the suspension of Bryant's license. The crucial question was whether there was a "close relationship" between the amendment and the subject matter of the original act. If there was such a relationship, then the caption of the particular amendment was sufficient if it referred to the statute being amended by number alone. This "close relationship" or "germaneness" is determined by whether one can ascertain the subject of the amendmnt by reading the amendment itself.[68] The court found this requirement to be present since there was only "one general subject," disbarment.

Two other contentions urged by Bryant to sustain his unconstitutionality

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[65] Ch. 1, § 1, [1939] Tex. Laws 64 (codified at TEX. REV. CIV. STAT. ANN. art. 320a-1 (1959).

[66] TEX. REV. CIV. STAT. ANN. art. 320a-1(6) after the 1969 amendment reads as follows:

> No disbarment proceeding shall be instituted against any attorney except in the district court located in the county of said attorney's residence, nor shall any attorney be suspended until such attorney has been convicted of the charge pending against him, in a court of competent jurisdiction in the county of such attorney's residence. Provided, however, upon proof of conviction of an attorney in any trial court of any felony involving moral turpitude or of any misdemeanor involving the theft, embezzlement, or fraudulent appropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter an order suspending said attorney from the practice of law during the pendency of any appeal from said conviction. An attorney who has been given probation after such conviction shall be suspended from the practice of law for the period of his probation. Upon proof of final conviction of any felony involving moral turpitude or of any misdemeanor involving theft, embezzlement, or fraudulent appropriation of money or other property, where probation has not been given or has been revoked, the district court of the county of the residence of the convicted attorney shall enter a judgment disbarring him.

[67] Ch. 1, § 1, [1939] Tex. Laws 64.

[68] 457 S.W.2d at 76.

argument were separation of powers and retroactivity. Rejecting these allegations, the court held that by enacting this amendment the legislature, although in fact legislating upon a matter which it had previously delegated to the Supreme Court of Texas (the authority to make rules and regulations for suspending and disbarring attorneys), was not invalidly exercising its legislative power. In fact, the court pointed out that the legislature was acting in accordance with the police power to protect the public interest and in aid of the judiciary.[69]

Bryant also argued that since the acts alleged to have been committed by him were done before the effective date of the 1969 amendment, its application with respect to him violated the prohibition against retroactive laws.[70] The court again relied upon the police power, pointing out that the legislature may revoke a license previously granted, and that such a proceeding was civil, not penal, in character. In addition, "subsequent procedural and remedial statutes are valid and they control litigation from their effective date."[71]

An interpretation of the Texas Unemployment Compensation Act[72] was called for in *Texas Employment Commission v. Busby*.[73] Sara Busby had been discharged by her employer after a fight with another employee. The issue was submitted to arbitration pursuant to the collective bargaining agreement in effect, and the arbitrator found that she had been wrongfully discharged and ordered a back pay award. Up to this time she had received $234 in unemployment compensation. The Amarillo court of civil appeals ordered that she repay the $234 to the Texas Employment Commission because she had not been totally unemployed, and that the back pay award constituted wages.

The court held that the definitions of "total unemployment" contained in article 5221b-17(l)[74] and "wages," found in article 5221b-17(n),[75] required interpretation of "services," which includes the "entire employer-employee relationship for which compensation is paid to the employee by the employer."[76] Since the employer was required to pay back wages to the employee on account of the wrongful discharge of that employee, the payment did in fact constitute wages, and the employee was not "totally unemployed" within the meaning of the Unemployment Compensation Act. The employee was, therefore, not eligible for those benefits.

In another decision involving statutory interpretation,[77] the court of civil appeals was confronted with a situation in which the Texas Air Control Board, pursuant to sections 3.09(a) and 3.10(c) of the Texas Clean Air Act,[78] had

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[69] *Id.* at 78.

[70] TEX. CONST. art. I, § 16.

[71] 457 S.W.2d at 78.

[72] TEX. REV. CIV. STAT. ANN. art. 5221b (1971).

[73] 457 S.W.2d 170 (Tex. Civ. App.—Amarillo 1970), *error ref. n.r.e.*

[74] TEX. REV. CIV. STAT. ANN. art. 5221b-17(1) (1971): "An individual shall be deemed 'totally unemployed' in any benefit period during which he performs no services and with respect to which no wages are payable to him."

[75] *Id.* art. 5221b-17(n): "'Wages' means all remuneration . . . for personal services, including the cash value of all remunerations paid in any medium other than cash . . . ."

[76] 457 S.W.2d at 172, quoting Social Security Bd. v. Nierotko, 327 U.S. 358 (1946).

[77] Houston Compressed Steel Corp. v. State, 457 S.W.2d 768 (Tex. Civ. App.—Houston [1st Dist.] 1970).

[78] TEX. REV. CIV. STAT. ANN. art. 4477-5, §§ 3.09(a), 3.10(c) (Supp. 1972):

> (a) The board has the power, in accordance with the procedures in this section, to make rules and regulations consistent with the general intent and

passed a regulation limiting outdoor burning to certain types, including domestic fires, campfires, and fires to control range grass or forest trees.[79] Byer's Barge Terminal regularly set fire to wood from old boxcars in order to salvage the scrap metal. Harris County and the State of Texas were granted an injunction by the trial court against Byer's on the ground that this outdoor burning was in violation of the Texas Clean Air Act.

In affirming the order of the trial court, the court of civil appeals noted that the Texas Clean Air Act does not provide the Air Control Board with the exclusive authority to set appropriate standards relating to the quality of the air in the state.[80] In fact, the court pointed out that the Board did not have any enforcement powers of its own, but could only bring suit in the district court for an injunction and/or penalties.[81]

Byer's also contended that the area of setting air pollution standards had been preempted by the federal government and that, consequently, the Texas Clean Air Act was of no force or effect. In disposing of this contention, the court noted that the federal legislation evidenced an intention to cooperate with state authorities.[82]

Byer's further alleged that the act was unconstitutional because the definition of "air pollution" in the Act[83] was too vague, and because the blanket prohibition in regulation II against outdoor burning was too vague to apply. Interestingly, the court recognized that the area of air pollution was a new one and indicated that there was a necessity for setting up rather broad standards because "[i]f they are too precise they will provide easy escape for those who wish to circumvent the law."[84] As to the vagueness argument concerning regulation II, the court rejected Byer's contention and held that the regulation was

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purposes of this Act and to amend any rule or regulation it makes.

. . . .

(c) The board is authorized to adopt rules and regulations to control and prohibit the outdoor burning of waste and combustible material. The board may include in the rules and regulations requirements as to the particular method to be used to control or abate the emission of air contaminants resulting from the outdoor burning of waste or combustible material.

[79] Tex. Air Control Bd. Reg. II.

[80] 456 S.W.2d at 772. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.05 (Supp. 1972): The Texas Air Control Board is the state air pollution control agency. The board is the principal authority in the state on matters relating to the quality of the air resources in the state and for setting standards, criteria, levels and emission limits for air content and pollution control.

[81] TEX. REV. CIV. STAT. ANN. art. 4477-5, § 4.02(a) (Supp. 1972): Whenever it appears that a person has violated or is violating, or is threatening to violate any provision of this Act or of any rule, regulation, variance or other order of the board, then the board, or the executive secretary when authorized by the board, may cause a civil suit to be instituted in a district court for injunctive relief to restrain the person from continuing the violation or threat of violation, or for the assessment and recovery of a civil penalty of not less than $50 nor more than $1,000 for each day of violation and for each act of violation, as the court may deem proper . . . .

[82] 456 S.W.2d at 772, citing 42 U.S.C.A. § 1857(a)(3) (1969).

[83] TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.03(3) (Supp. 1972) provides: '[A]ir pollution' means the presence in the atmosphere of one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation or property, or as to interfere with the normal use and enjoyment of animal life, vegetation or property . . . .

[84] 456 S.W.2d at 774.

reasonable and enacted for the "public health, safety and welfare."[85] In addition, the court relied upon the difficulty in measuring the amount of contaminants passing into the air from outdoor burning and found that regulation II's prohibition was not unreasonable. The Board, in promulgating this regulation, had acted within its statutory authority.

In a case involving a disbarred attorney, with a right to be reinstated after five years, the court of civil appeals held that there was no judicial discretion regarding the five-year period of disbarment.[86] Steere, the disbarred attorney, had filed a motion for reinstatement within two years after his disbarment. The trial court deferred this motion until the five-year period had passed. Steere alleged that article XII, section 32 of the State Bar Rules,[87] providing for a five-year period of disbarment, was unconstitutional in that it violated due process. Since the word "may" is found in section 32, Steere contended that the section was permissive and not mandatory. However, the court held to the contrary, and construed section 32 and section 28, the penalty section, together. Section 28 provides that the trial court has a choice of three penalties once a defendant lawyer has been found guilty of misconduct: (1) reprimand; (2) suspension from practicing law for a term to be decided by the trial judge; and (3) disbarment.[88] The court noted that choices (2) and (3) were similar in effect, in that they prohibited an attorney from practicing law, but only the suspension provision provided for any judicial discretion with respect to the period of time involved. Therefore, the court held the five-year period for disbarment contained in section 32 to be mandatory.

In *Tackett v. State Board of Registration for Professional Engineers*[89] the Corpus Christi court of civil appeals interpreted the Texas Engineering Practice Act.[90] Carl Tackett was operating his television sales and service business under the name of "Television Engineering Company." The State Board of Registration secured a summary judgment and a permanent injunction against Tackett's using the term "engineering" in his advertising and other business activity. The court of civil appeals affirmed, holding that Tackett had violated the Texas Engineering Practice Act by using the term "engineering" in his firm name, because he was not a licensed engineer and did not employ any licensed engineers.[91] Tackett's primary contention was that the Act did not apply to him because of the section 20 exemption for repair-type work on "electronic or communications equipment and apparatus."[92] The court met this argument by pointing out that the preamble to section 20 explains that the exemptions are applicable only if "such persons are not represented or held out to the public

[85] *Id.* at 775.

[86] Steere v. State Bar of Texas, 464 S.W.2d 732 (Tex. Civ. App.—Houston [1st Dist.] 1971), *error dismissed.*

[87] Rules Governing the State Bar of Texas art. XII, § 32, 1A TEX. REV. CIV. STAT. ANN. 229 (1959): "At any time after the expiration of five years from the date of final judgment of disbarment of a member, he may petition the District Court of the county of his residence for reinstatement . . . ."

[88] *Id.* § 28, at 229.

[89] 466 S.W.2d 332 (Tex. Civ. App.—Corpus Christi 1971).

[90] TEX. REV. CIV. STAT. ANN. art. 3271a (1969).

[91] Tackett was alleged to have violated §§ 1.1, 1.2(2), 1.2(3), and 18, all of which, in essence, prohibited the use of the word "engineer" or some form thereof as a professional, business, or commercial identification, title, name, representation, or the like.

[92] TEX. REV. CIV. STAT. ANN. art. 3271a, § 20(e) (1968).

as duly licensed and registered by the Board to engage in the practice of engineering."[93] The court interpreted this as meaning that the use of the term "engineering" by a nonlicensed person or company is a holding out to the public that such person or company is licensed and registered by the Board. Therefore, even if a business would otherwise come under the exemptions of the Act, if that business uses the term "engineering" in its name, the exemptions become inapplicable and a violation of the Act has occurred.

In *Standifer v. Texas Dep't of Public Safety*[94] Standifer's driver's license was suspended for driving while intoxicated. Standifer then filed his petition in the county court seeking probation of this suspension. The trial court held it was without jurisdiction to hear the matter and had no authority to grant probation under article 6687b, section 22(e).[95]

On appeal dismissal of the case was affirmed, and the court of civil appeals held that there was no right of appeal from an *automatic* suspension of a driver's license that resulted after a final conviction for driving while intoxicated. The only time an appeal will be allowed in such a situation is when "the entire judgment of conviction and sentence are timely probated."[96] Since Standifer's suspension was automatic after conviction for driving while intoxicated, and no provision for probation was made, he could not appeal the suspension. In arriving at this conclusion, the court interpreted article 6687(b), section 22(b)(1)[97] as authorizing the Department of Public Safety "to suspend the license of an operator *upon a factual determination at an administrative proceeding* that the licensee "has committed an offense for which automatic suspension of license is made upon conviction."[98] However, the court distinguished section 24(a)(2), which provides for the suspension of a driver's license upon a final *conviction* for driving while intoxicated. Therefore, since Standifer's suspension was made pursuant to section (a)(2) and not section 22(b)(1), he was not entitled to utilize the appeal provisions of section 22. Likewise, he could not avail himself of the right of appeal under section 31[99] because that section expressly disallows appeals when cancellation or revocation of a license is automatic.

Three other civil appeals cases with similar facts involved interpretations of article 6687(b).[100] In all three cases a driver's license had been suspended on

[93] *Id.* § 20.

[94] 463 S.W.2d 38 (Tex. Civ. App.—Houston [14th Dist.] 1971).

[95] TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(e) (1969).

[96] 463 S.W.2d at 41.

[97] TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(b)(1) (1969):

> (b) The authority to suspend the license of any operator, commercial operator, or chauffeur as authorized in this Section is granted the Department upon determining after proper hearing as hereinbefore set out that the licensee: 1. Has committed an offense for which automatic suspension of license is made upon conviction; . . . .

[98] 463 S.W.2d at 40 (emphasis added).

[99] TEX. REV. CIV. STAT. ANN. art. 6687b, § 31 (1969) provides for appeal to the courts by any person who has been denied a license or whose license has been cancelled or revoked by the Department. However, as mentioned by the court, this section expressly excludes appeal when the license has been cancelled or revoked automatically under the provisions of the act.

[100] White v. Texas Dep't of Pub. Safety, 462 S.W.2d 958 (Tex. Civ. App.—Eastland 1970); Franklin v. Texas Dep't of Pub. Safety, 462 S.W.2d 350 (Tex. Civ. App.—Eastland 1970); Fauver v. Texas Dep't of Pub. Safety, 461 S.W.2d 206 (Tex. Civ. App.—Eastland 1970).

account of habitual traffic violations,[101] summary judgment was granted upon the motion of the Department of Public Safety, and the period of suspension set. In all three cases the Eastland court of civil appeals held that since the length of suspension of the license because of habitual traffic violations was not fixed by statute (except for a maximum of one year), there will always be a material question of fact regarding the duration of a suspension which will prevent the granting of a summary judgment.

In *Forrester v. State*[102] Jack Forrester, an attorney, had been disbarred in a trial without a jury. On appeal Forrester argued that the disbarment was invalid because he had been denied the right to trial by jury, and that he had given up the practice of law, was no longer a member of the State Bar of Texas and was, therefore, not subject to any disciplinary action by the state bar.

In affirming the disbarment, the court of civil appeals held that Forrester had no right to a jury trial since article 316[103] had been repealed, and since he had not deposited the required jury fee as required by rule 216 of the Texas Rules of Civil Procedure.[104]

Forrester's most interesting contention, however, was that the trial court erred in failing to dismiss the cause at the outset because he was not subject to to any disciplinary action by the state bar. In support of this argument, Forrester relied on article IV, section 5 of the State Bar Rules[105] which provides for the striking of an attorney's name from the bar rolls for nonpayment of dues. Accordingly, the clerk of the Supreme Court of Texas had removed Forrester's name when he failed to pay his 1967 dues, all of which occurred prior to the disbarment action. Forrester also alleged that he had "voluntarily and finally" given up the practice of law on March 1, 1967. Therefore, he argued, the only action that the state bar could bring aganist him would be for the unauthorized practice of law, and "that a person, not a member of the State Bar of Texas and who is therefore subject to prosecution for the unauthorized practice of law, cannot, at the same time, be subjected to any disciplinary action as a member of the State Bar of Texas."[106] Overruling Forrester's points of error, the court of civil appeals held that even though a lawyer does not engage in the active practice of law, he is still subject to the Canons of Professional Ethics and, therefore, also amenable to disciplinary actions for violations thereof brought by the state bar. This result is compelled, reasoned the court, because Forrester still had a valid license to practice law in Texas and that license is issued for life absent removal. The fact that a lawyer would have been prohibited from practicing law under article 320a-1[107] because he was not a dues-paying member of the state bar was of no consequence in a disbarment proceeding.

Consequently, it appears that once a lawyer has become a member of the

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[101] TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(b)(4) (1969).

[102] 459 S.W.2d 698 (Tex. Civ. App.—Corpus Christi 1970), *error ref. n.r.e.*

[103] TEX. REV. CIV. STAT. ANN. art. 316 (1959) provided for a jury, unless waived by the defendant. However, State v. Dancer, 391 S.W.2d 504 (Tex. Civ. App.—Corpus Christi 1965), *error ref. n.r.e.*, held that this was repealed by the State Bar Act, art. 320a-1.

[104] TEX. R. CIV. P. 216.

[105] Rules Governing the State Bar of Texas art. IV, § 5, 1A TEX. REV. CIV. STAT. ANN. 229 (1959).

[106] 459 S.W.2d at 701.

[107] TEX. REV. CIV. STAT. ANN. art. 320a-1 (1959).

Texas bar, he remains forever subject to disciplinary actions by that body, even though he eventually is considered not to be a member.

The Substantial Evidence Rule. In Texas, as a general rule, the substantial evidence rule is based upon a trial de novo in the district court. The litigant must try his case before the agency and then before the district court. On appeal to an appellate court, the judge must determine from the record prepared in the district court whether, as a matter of law, there is substantial evidence in that record to support the conclusion of the administrative body.[108]

This principle was applied in *Railroad Commission v. Southern Pacific Co.*[109] Southern Pacific Company had applied to the Railroad Commission for authority to discontinue its Elsa, Texas, agency and to transfer the agency to Edinburg, Texas, approximately twelve miles distant. The Railroad Commission denied the application. Southern Pacific then filed suit in the district court pursuant to article 6453.[110] The court set aside the Commission's order on the basis that substantial evidence did not support the order. On appeal the Commission asserted error predicated upon the admission of hearsay evidence in the district court, which apparently had been admitted before the Commission. The court of civil appeals reversed and rendered judgment in favor of the order of the Commission, denying the railroad's application to transfer the agency in question.

Much emphasis was placed upon article 3737(e), the Business Records Act,[111] and a number of the exhibits admitted by the trial court were declared to be inadmissible because the requirements of that Act were not met.[112] The court of civil appeals noted that hearsay evidence, even though admitted without objection, will not be considered in applying the substantial evidence rule.[113] In discussing applicable principles regarding the substantial evidence rule, the court reiterated that the quantum of evidence necessary is somewhat more than a mere scintilla, but somewhat less than a preponderance.[114] Reviewing the admissible evidence presented before the district court, one witness for the railroad, a trainmaster, testified that the Elsa agency was causing unnecessary expense, and that closing the Elsa station would save "some money." In addition, he testified that continuing the Elsa agency would be "an economic waste." Another witness for the railroad, a cost analysis expert, testified with reference to the inadmissible records. Without the introduction of these records, his opinions were based upon hearsay and were not to be considered in determining whether there was substantial evidence to support the Commission's order.

The Commission, on the other hand, presented four witnesses at the district court level to support its order refusing authority to close and transfer the Elsa

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[108] *See* Guinn, *Administrative Law, Annual Survey of Texas Law*, 24 SW. L.J. 216, 225-26 (1970). Note also that substantial evidence review in the federal courts is limited to the record prepared at the administrative hearing.

[109] 468 S.W.2d 125 (Tex. Civ. App.—Austin 1971), *error ref. n.r.e.*

[110] TEX. REV. CIV. STAT. ANN. art. 6453 (1926) provides for an appeal to the district court in Travis County from any order of the Railroad Commission.

[111] TEX. REV. CIV. STAT. ANN. art. 3737e (1966).

[112] 468 S.W.2d at 128.

[113] *Id.* at 129.

[114] *Id.*

agency. All of these witnesses were businessmen in Elsa who used the agent's services in handling railroad shipments. They testified, in essence, that to close the agency at Elsa would create inconvenience as well as possible additional expense.

The court of civil appeals concluded that the Commission's order was supported by substantial evidence and refused to close the Elsa agency. Since the bulk of the evidence offered by the railroad was hearsay and could not be considered in determining the existence of substantial evidence, the other evidence did not show "economic waste" or loss of net gains in continuing the operation of the Elsa agency. In addition, there was no evidence to show that substitution of Edinburg for Elsa would not impair the rail service at Elsa. The railroad in this case apparently was required to show that the service at Elsa would at least be maintained in some manner after transferring that agent to Edinburg.

However, in *Southmore Savings Ass'n v. Lewis*[115] the Austin court of civil appeals noted that in appeals from the Savings and Loan Commissioner, Texas follows the federal rule in that judicial review is "limited to the *record* made at the *administrative hearing*."[116] The court stated that in reviewing the Commissioner's action based upon the administrative record, if opinion testimony therein was based upon "largely hearsay" evidence not corroborated by other witnesses, it cannot afford the basis for finding that substantial evidence existed.

Southmore Savings instituted the action in district court seeking a reversal of the Savings and Loan Commissioner's order granting an application for a charter for a Modern Savings and Loan Association to be operated within the same general area as Southmore. The district court sustained the decision of the Commissioner. The primary issue on appeal revolved around opinion testimony based upon material that was not properly admitted into evidence. The court stated that while official publications of various federal agencies may be considered in an administrative proceeding, the material should be made available to the opposing party instead of having an expert testify regarding portions he has extracted. Even though an official writing may be admissible by reason of article 3731(a), section 1,[117] it may necessarily be hearsay and cannot serve as a basis for a finding that the Commissioner's order was supported by substantial evidence.[118] Further, opinion testimony offered by an expert and based upon matters not admitted into evidence will be closely scrutinized. In distinguishing several cases cited in support of the proposition that the opinion of an expert is admissible at the hearing even when the opinion is based upon hearsay, the court held that the following test should apply: The opinion of the expert must be based upon facts, proved or assumed, as in the instance of a hypothetical question, and such facts must be sufficient to form a basis for the opinion of the expert.[119] The expert's opinion cannot *itself* furnish the substantial facts needed to support his conclusion. Thus, if the evidence upon which the opinion is based

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[115] 467 S.W.2d 226 (Tex. Civ. App.—Austin 1971), *error granted.*

[116] *Id.* at 232, citing Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1966). *See* note 109 *supra.*

[117] TEX. REV. CIV. STAT. ANN. art. 3731a, § 1 (1966) provides for admission into evidence of official written instruments, certificates, records, returns, and reports.

[118] Benson v. San Antonio Savings Ass'n, 374 S.W.2d 423, 429 (Tex. 1963).

[119] 467 S.W.2d at 230.

is "largely hearsay, nebulous, or of a species deemed unreliable,"[120] it should be excluded by the Commissioner. However, corroborated hearsay that is "trustworthy" does not fit into the category of that evidence of a "species deemed unreliable."

After an extensive review of the evidence the court concluded that the record did not contain substantial evidence to support the Commissioner's findings, and set aside his order. The court made an interesting statement regarding the amount of hearsay that is permissible in an administrative proceeding:

> It is neither practical, nor is it the function of the courts, to lay down rules fixing an inflexible level of tolerance, for the percentage of hearsay and other incompetent evidence allowable in a record of administrative proceedings. But when the hearsay reaches such proportion that in the opinion of the court the action of the administrative agency was substantially influenced by the hearsay or other incompetent evidence, the order of the agency ought to be set aside.[121]

Therefore, even though judicial review is based upon the administrative record in appeals from decisions of the Savings and Loan Commission, hearsay evidence will not support a finding of substantial evidence. An unusual twist to this rule, however, is that an administrative agency is not governed by the common-law rules of evidence, and an objection based upon hearsay at an administrative proceeding has generally been considered to be unfounded. According to the *Southmore* case, on the other hand, the attorney representing the Commissioner must be aware that if his evidence contains a sufficient quantum of hearsay evidence so as to "substantially influence" the decision of the agency, an appellate court may set aside the Commissioner's order, because that hearsay will not support a substantial evidence determination.

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[120] *Id.*
[121] *Id.* at 239.