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ADMINISTRATIVE LAW

by

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DURING the past year Texas appellate courts continued to resolve questions of administrative law which fall within three primary classifications adopted for the previous *Surveys*.[1] These classifications are constitutional considerations, administrative adjudications, and judicial review. A substantial amount of the litigation dealt with the various areas of administrative adjudication: specifically, mootness, exhaustion, and the validity of agency orders.

I. CONSTITUTIONAL CONSIDERATIONS

Due Process, Vagueness, and Improper Delegation of Legislative Authority. The San Antonio court of civil appeals had an opportunity to rule upon the constitutionality of certain provisions of the Texas Medical Practice Act[2] in *Martinez v. Texas State Board of Medical Examiners*.[3] A verified complaint was filed with the board charging Martinez with violating sections 2, 4, and 12 of article 4505 of the Medical Practice Act.[4] In summary, the violations involved two separate counts of assaulting female patients during the course of examinations;[5] one count of illegally prescribing amphetamine drugs;[6] one count of attempting to produce an abortion upon a patient;[7] and one count of permitting an employee to order prescriptions, take and report blood samples, and give injections.[8]

Notice was given and a hearing was held before the board. At the conclusion of the hearing an order revoking and cancelling Martinez's license was issued. He perfected an appeal to the district court, and, after a trial without a jury, the judge found that the order was supported by substantial evidence and accordingly upheld the board's determination.

Before the court of civil appeals the appellant raised several questions. He initially contended that the board's order was not supported by substantial evidence. After a laborious examination of the trial court record, the court of

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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); Guinn & Hawke, *Administrative Law, Annual Survey of Texas Law*, 26 SW. L.J. 226 (1972).

[2] TEX. REV. CIV. STAT. ANN. arts. 4495-4512 (1966).

[3] 476 S.W.2d 400 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*

[4] TEX. REV. CIV. STAT. ANN. art. 4505, §§ 2, 4, 12 (1966). Article 4505 enumerates thirteen reasons for which the Board of Medical Examiners may refuse to admit persons to its examinations, and to issue them a license to practice medicine.

[5] The board alleged this to be a violation of § 4, which applies to "[g]rossly unprofessional or dishonorable conduct, [of] a character which in the opinion of the Board is likely to deceive or defraud the public." *Id.* § 4.

[6] The board likewise alleged this to be a violation of § 4.

[7] This was alleged to be a violation of § 2, which lists conviction of a felony, or of a crime involving moral turpitude, or procuring, or aiding or abetting the procuring of a criminal abortion as grounds for action by the board.

[8] This act was alleged to be a violation of § 12, which prohibits "[t]he impersonation of a licensed practitioner, or permitting or allowing, another to use his license, or certificate to practice medicine in this State, for the purpose of treating, or offering to treat, sick, injured, or afflicted human beings." TEX. REV. CIV. STAT. ANN. art. 4505, § 12 (1966).

appeals came to the conclusion that there was substantial evidence that Martinez committed acts that constituted grossly unprofessional or dishonorable conduct because they were likely to deceive or defraud the public in violation of section 4 of article 4505.[9]

Martinez then contended that section 4 was unconstitutionally vague, and amounted to an unconstitutional delegation of legislative powers to the board by allowing the board members to determine what acts constitute a violation of the section. In rejecting both of these contentions, the court referred to the Texas Supreme Court case of *Jordan v. State Board of Insurance*,[10] in which the court upheld the authority of the Insurance Board to refuse to issue or to revoke an insurance company's certificate of authority when it appeared to the board that the company's officers and directors were "not worthy of the public confidence."[11] In *Jordan* the court said that when determining whether a provision was unconstitutional because it vested unbridled discretion in a regulatory body, the test to be applied was whether the provision is "reasonably clear and hence acceptable as a standard of measurement."[12] Thus, the court of appeals in *Martinez* concluded that the phrase "grossly unprofessional or dishonorable conduct [of] a character which in the opinion of the Board is likely to deceive or defraud the public"[13] met this test. The medical board is composed entirely of professional members who best know the professional and moral standards required of practitioners.

The appellant then contended that the 1967 revision of article 4506,[14]

[9] The court concluded that there was no substantial evidence to support a charge under § 2, relating to the abortion. However, in view of the fact that the court found substantial evidence to support the charges under § 4, relating to grossly unprofessional or dishonorable conduct, it found it unnecessary to consider the evidence regarding Martinez's alleged violation of § 12.

[10] 160 Tex. 506, 334 S.W.2d 278 (1960).

[11] TEX. INS. CODE ANN. art. 1.14, § 3 (1963).

[12] 160 Tex. at 510, 334 S.W.2d at 280. The court in *Jordan* stated:

> While the term 'not worthy of the public confidence' is broad and undoubtedly encompasses a multitude of factors, it is no more extensive than the public interest demands. . . . A court may act with reasonable certainty in reviewing a finding and while many elements . . . may enter into the conclusion that one is unworthy of public confidence, it does not necessarily follow that an administrative board must first establish detailed rules in order to carry out its statutory duty to make sure that the insurance companies of this state have competent officers and directors.

Id.

[13] TEX. REV. CIV. STAT. ANN. art. 4505, § 4 (1966).

[14] Ch. 666, § 2, [1967] Tex. Laws 1763 (codified at TEX. REV. CIV. STAT. ANN. art. 4506 (Supp. 1972)), provides in part:

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

This amendment was recently held to have no retroactive effect in Texas State Bd. of Med. Exam'rs v. Haney, 472 S.W.2d 550 (Tex. Civ. App.—Austin 1971), *error ref. n.r.e.* In January 1966 the board cancelled Haney's license to practice medicine. Pursuant to article 4506, he appealed the board's cancellation by filing suit in an appropriate district court. The board answered and filed a cross-action against Haney asking that its order of revocation be affirmed. The suit was never tried, and was dismissed for want of prosecution. Evidently neither Haney nor the board was aware of the dismissal, and the board continued to renew Haney's license until 1971, when it refused to do so. Haney secured a writ of mandamus ordering the board to allow him to register as a licensed physician for that year. The board appealed, contending that the amendment changing the de novo appeal to substantial evidence review was procedural in character, and therefore retrospective and applicable to

which substituted substantial evidence review for de novo review, deprived him of his right to a jury trial and findings beyond a reasonable doubt. Prior to 1967 the legislature had committed the revocation of medical licenses to the courts in de novo proceedings.[15] The court of appeals concluded, however, that under the Texas Constitution[16] the legislature had complete autonomy over the regulation of the medical profession and was perfectly free to provide for the limited scope of judicial review afforded by substantial evidence.

Martinez further contended that substantial evidence review deprived him of due process in violation of the United States Constitution. The court of appeals replied to this contention by declaring that the basic elements of due process are notice, hearing, and an impartial trial of facts. The ultimate test of due process in an administrative hearing is the presence or absence of the rudiments of fair play. The court held that the notice, hearing, and review provisions of article 4506 met the test of fair play and did not deprive the litigant of due process.

In conclusion, Martinez complained specifically about the constitutionality of Texas' substantial evidence review or what has been characterized by a member of the Texas Supreme Court as "substantial evidence de novo review."[17] The court admitted that this "unique" scope of review has been severely criticized; nevertheless, it has been consistently upheld by the courts.[18]

Due Process: Inspection and Testing as a Valid Substitute for Administrative Hearings. In *Nunley v. Texas Animal Health Comm'n*[19] the San Antonio court of civil appeals was confronted with the question of whether due process had been complied with in an instance in which inspection and testing by an administrative agency had taken the place of a formal hearing, even though "adjudicative" facts were involved.[20] Nunley owned a herd of cattle located in McMullen County, Texas. McMullen County had been designated

Haney's case. The board argued that since the proceedings against Haney were changed by the amendment to a substantial evidence review, the order of cancellation was presumed valid until the doctor demonstrated that it was not supported by substantial evidence, and, therefore, the dismissal of the litigation had the effect of affirming the cancellation order.

The court of appeals disagreed and concluded that statutes will not be applied retroactively unless it appears by fair implication from the statutory language that the intention of the legislature was to make it applicable to both past and future transactions.

[15] In Scott v. Texas State Bd. of Med. Exam'rs, 384 S.W.2d 686 (Tex. 1964), a de novo review of medical license revocations as provided in old art. 4506 was extensively discussed and upheld. *Martinez* presented the reverse of the question presented in *Scott*; *i.e.*, does the legislature have the constitutional power to limit review to that of substantial evidence, even though the fact in issue has been previously characterized by the courts as being "judicial"?

[16] TEX. CONST. art. XVI, § 31 expressly delegates the authority to the legislature to pass laws prescribing the qualifications of practitioners of medicine and to punish persons for malpractice.

[17] Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 SW. L.J. 239 (1969).

[18] For excellent discussions of Texas substantial evidence review, see *id.*; and Walker, *The Application of the Substantial Evidence Rule in Appeals from Orders of the Railroad Commission*, 32 TEXAS L. REV. 639 (1954).

[19] 471 S.W.2d 144 (Tex. Civ. App.—San Antonio 1972), *error ref. n.r.e.*

[20] In most administrative proceedings in which "adjudicative" facts are involved, the litigant should be afforded a trial-type hearing upon the fact or facts in issue. However, there are several well-recognized exceptions to this rule: (1) where emergency or temporary action is necessary; (2) for adjudications based on inspections and tests; (3) when the interest at stake is not a legal right, but is in the nature of a privilege; and (4) when national security is involved. K. DAVIS, ADMINISTRATIVE LAW TEXT 140 (1965).

as a Type II brucellosis control area under the provisions of the pertinent statute.[21] In such an area the commission is authorized to conduct such tests, vaccinations, and other practices, and to enforce such rules and regulations as may be necessary to eradicate the disease.[22]

Prior to September 11, 1968, the commission directed Nunley to have his herd inspected. Blood samples were promptly taken from all of the 438 animals in the appellant's herd, and were tested by the state laboratory using the "card test" for brucellosis. On September 13, 1968, the laboratory informed Nunley's veterinarian that seventeen of the cattle were infected. Nunley then requested that the seventeen infected animals be retested. The commission acquiesced and reinspected the animals. This time, however, the blood samples were subjected not only to the "card test," but also to the other two examinations which the commission recognizes as official: the "plate test" and the "tube test." In addition, the Rivanol supplemental examination was employed, although it is not officially recognized by the commission. The results from this second examination were highly irregular. The card test indicated that ten of the animals were infected, the plate test indicated only one, and the tube and Rivanol tests indicated three "reactors."

On January 30, 1969, the commission suggested a third test for Nunley's herd, and offered to allow him to select either the card or plate test as determinative. Nunley refused because his efforts to obtain the results from the tube, plate, and Rivanol tests had proven fruitless. On February 11, 1969, the commission informed Nunley that his entire herd was quarantined, and that a member of the commission would come upon his premises on February 25, 1969, for the purpose of branding the ten animals which the second card test identified as diseased.[23]

Nunley then brought suit in the appropriate district court to have the commission enjoined from quarantining his herd and destroying the ten allegedly diseased animals. The trial judge declared the quarantine void, but ordered the owner to present his herd for retesting. Nunley appealed this ruling.

The appellant first contended that the Texas program was unconstitutional because the statute, rules, and regulations are not an appropriate and reasonable means of accomplishing eradication of brucellosis. The essence of his argument was that the program is so oppressive and unreasonable in light of the circumstances, that it operates as a deprivation of property without due process of law. This contention rests upon the assumption that the tests relied on by the commission are not accurate methods of detecting brucellosis. The court of appeals promptly disposed of this contention by asserting that the

[21] TEX. PEN. CODE ANN. art. 1525b, § 23A(4) (1971). Bovine brucellosis is a disease which frequently infects cattle.

[22] *Id.* § 23A(9).

[23] If the tests reveal the presence of brucellosis, the animals whose positive reaction to the test shows them to be infected are branded with the letter "B" on the left jaw. Those infected must be handled in accordance with the rules and regulations of the commission, "which shall provide for the issuance of quotations, the manner, method and systems of disposing of reactor cattle, the testing and retesting of infected herds, and the cleaning and disinfection of premises following the removal of reactor cattle." *Id.* § 23A(18). A branded animal must be sold for slaughter within 15 days.

evidence supported the findings that the card test is reasonably reliable and accurate. Further, the evidence showed that the Texas program is essentially the same as that followed throughout the United States, and that such programs had been effective in controlling and eradicating the disease.

The appellant's concluding point on appeal asserted that the Texas program violated the requirements of due process because the statutory scheme did not afford the litigant a hearing on the question of whether or not brucellosis is present in his herd. In rejecting this contention, Judge Cadena alluded to the fact that there are numerous holdings that due process does not necessarily require the granting of a hearing prior to the taking of administrative action.[24] Further, the courts have frequently recognized inspection and testing as valid substitutes for an administrative hearing.[25] This conclusion is supported by the great weight of authority in the United States. As Professor Davis has observed, in some instances hearings are inferior to inspection, examination, or testing.[26]

II. ADMINISTRATIVE ADJUDICATION

Mootness. One of the most unique holdings of 1972 was rendered by the supreme court in *Texas Alcoholic Beverage Comm'n v. Carlin.*[27] Carlin had been issued a wine and beer retail permit and a retail-dealer's-on-premises 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 the suspension order. The district court issued an ex parte order staying the order of the commission during the pendency of the suit or until a final determination of the cause. 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 the commission's order aside.

The court of appeals reversed the trial court and dismissed the appeal, holding that the case was moot since the fifteen-day suspension had expired before the case was tried in the district court.[28] The supreme court, in affirming the decision of the court of civil appeals, specifically stated that the reason for granting the application for writ of error was because of their tentative belief that the holding of the court of civil appeals was unsound. The supreme court concluded that the issue was moot, but this conclusion was based on events which occurred after the lower appellate decision.

Shortly before the case was to be argued before the supreme court, the attorney general learned for the first time that Carlin no longer held a wine and beer retail permit. The parties had filed a stipulation that after the motion for rehearing was overruled by the court of civil appeals, the commission issued Carlin a late hours permit in conjunction with a mixed beverage permit.

[24] 471 S.W.2d at 148.

[25] *See, e.g.*, Ewing v. Mytinger & Castleberry, Inc., 339 U.S. 594 (1950); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908).

[26] K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.09 (1958).

[27] 477 S.W.2d 271 (Tex. 1972).

[28] Texas Alcoholic Beverage Comm'n v. Carlin, 468 S.W.2d 521 (Tex. Civ. App.—Beaumont 1971), *discussed in* Guinn & Hawke, *supra* note 1, at 230.

Carlin then surrendered his wine and beer retail permit and accompanying late hours license. The supreme court, therefore, concluded that "the particular controversy that gave rise to this suit, *i.e.*, the dispute over the suspension of Carlin's wine and beer permit and late hours license, has become simply an academic matter."[29]

Exhaustion. In *Dub Shaw Ford, Inc. v. Comptroller*[30] the comptroller had audited both Dub Shaw Ford and McCombs Leasing Company and, as a result, declared that additional taxes were due from both for certain periods of time under the motor vehicles sales and use tax provision.[31] Dub Shaw Ford, asserting that the comptroller had wrongfully construed the applicable laws, requested and was granted a hearing on redetermination by the comptroller under article 1.032.[32] Following the hearing, an order was issued confirming Shaw's liability for back taxes.

McCombs Leasing likewise requested a redetermination under article 1.032; however, prior to any order being issued by the comptroller on this application, both Dub Shaw Ford and McCombs Leasing filed suit for a declaratory judgment in the district court in Travis County seeking a judicial determination of their tax liability. It was conceded that neither of the parties complied with the appropriate statutory provisions for administrative review of the comptroller's decisions. Dub Shaw Ford, after the redetermination order, did not pay the tax under protest as required by article 1.05,[33] and McCombs Leasing simply did not wait for the comptroller to pass upon its redetermination application under article 1.032(c). The district court, therefore, dismissed the suit on the comptroller's plea challenging the jurisdiction of the court because the taxpayers had not exhausted their administrative remedies as provided by statute.

Dub Shaw Ford and McCombs Leasing promptly appealed and rested their cases largely upon the holding of the supreme court in *Cobb v. Harrington.*[34] They asserted that *Cobb* held that a declaratory judgment suit could be brought in a situation such as this, as an alternative to the protest statute then in effect.[35] In other words, the appellants contended that the suspense statute, providing for suit to recover taxes paid under protest, does not provide an exclusive remedy which would preclude action for a declaratory judgment. In rejecting this contention, the Austin court of civil appeals first pointed out that subsequent to the decision in *Cobb* the legislature enacted articles 6.06[36]

[29] 477 S.W.2d at 273.

[30] 479 S.W.2d 403 (Tex. Civ. App.—Austin 1972).

[31] TEX. REV. CIV. STAT. ANN. tit. 122A, arts. 6.01-.09 (1969).

[32] *Id.* art. 1.032 provides that any person against whom a deficiency determination is made under art. 1.032, or any person directly interested, may petition for a redetermination within 30 days after service upon the person of notice of the deficiency. If a petition for redetermination is filed within the 30-day period, the comptroller is required to reconsider the determination and grant the person an oral hearing if a hearing has been requested in his petition. The order or decision of the comptroller upon a petition for redetermination becomes final 30 days after service upon the petitioner of notice thereof.

[33] *Id.* art. 1.05.

[34] 144 Tex. 360, 190 S.W.2d 709 (1945).

[35] TEX. REV. CIV. STAT. ANN. art. 7057(b), §§ 1, 2 (1960) and *id.* tit. 122A, art. 1.05 (1969) are for all practical effects identical.

[36] Ch. 138, § 2, [1963] Tex. Laws 371 (codified at TEX. REV. CIV. STAT. ANN. tit.

and 1.032 of title 122A,[37] which provide specific statutory procedures for administrative appeals from decision of the comptroller. Secondly, the court pointed to specific language in *Cobb* which indicated that decision did not apply when a statute provides an administrative board, special tribunal, or special procedure for the particular type of case.[38] Subsequent to *Cobb* the legislature had provided a special procedure for this type of tax deficiency case.

The question had thus been narrowed to a consideration of the doctrine of exhaustion of administrative remedies. Since both appellants had sought the jurisdiction of the comptroller under the statutes providing for redetermination, the district court properly denied the declaratory judgment. This view was in conformance with the holding of the supreme court, that an action for declaratory judgment will not be entertained if another action or proceeding between the same parties is pending which may result in an adjudication of the issues involved in the declaratory action.[39] The court concluded:

> [O]nce the Appellants elected to proceed under the administrative remedies, they must exhaust them and may not abandon them and file a petition for a declaratory judgment. Appellant McCombs did not await the outcome of his petition for a redetermination by the Comptroller's department but elected to abandon that proceeding and file a suit for a declaratory judgment. Appellant Dub Shaw Ford, Inc., instead of proceeding to pay the tax under protest . . . elected to abandon that proceeding and filed suit for declaratory judgment. Appellants have a right for a judicial determination following the exhaustion of the administrative remedy.[40]

Validity of Agency's Order. In two important companion cases rendered by the supreme court, the fact finding functions of the savings and loan commissioner under section 11.11(4) of the Texas Savings and Loan Act[41] were brought under scrutiny.[42] The issue in these decisions was whether in granting either a new charter application or a branch office application to an existing savings and loan association, the commissioner must set out a concise and explicit statement of the underlying facts supporting his findings.

In *Lewis v. Gonzales County Savings & Loan Ass'n*[43] the commissioner approved the application of South Texas Savings and Loan Association of Vic-

122A, art. 6.06 (1969)) requires the comptroller to promulgate rules and regulations under which the seller may petition for a redetermination of liability. However, the comptroller must grant the seller an oral hearing.

[37] Ch. 402, § 8, [1965] Tex. Laws 830.

[38] In *Cobbs* the supreme court made the following statement: "We do not hold that the declaratory judgment procedure may be used when a statute provides an administrative board or other special tribunal or special procedure for the particular type of case in hand, as, for example, a workmen's compensation case." 144 Tex. at 369, 190 S.W.2d at 714.

[39] Here the court of civil appeals relied upon the supreme court decision in Texas Liquor Control Bd. v. Canyon Creek Land Corp., 456 S.W.2d 891 (Tex. 1970).

[40] 479 S.W.2d at 406-07.

[41] TEX. REV. CIV. STAT. ANN. art. 852(a), § 11.11(4) (1969):

> 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.

[42] Bay City Fed. Sav. & Loan Ass'n v. Lewis, 474 S.W.2d 459 (Tex. 1971); Lewis v. Gonzales County Sav. & Loan Ass'n, 474 S.W.2d 453 (Tex. 1971).

[43] 474 S.W.2d 453 (Tex. 1971).

toria County to establish a branch office in Lavaca County. Gonzales County Savings and Loan contested this application on the ground that the commissioner's order was invalid for non-compliance with section 11.11(4) of the Savings and Loan Act because it did not contain a concise and explicit statement of the underlying facts supporting the findings. 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; that the applying association has had a profitable operation for the three-year period next preceding the filing of such application after paying operating expense, 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.[44]

The court of civil appeals held that the recital 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 the statutory rules.[45]

In *Bay City Federal Savings & Loan Ass'n v. Lewis*[46] the commissioner approved the granting of a new charter to A.J. Stanish to operate the Matagorda County Savings and Loan Association in Bay City, Texas. Bay City Federal Savings and Loan contended that the lack of a concise and explicit statement of the facts supporting the commissioner's findings vitiated the entire order. The order of the commissioner provided: "The Commissioner is further of the opinion and finds that the prerequisites as set forth in Sections 2.02, 2.03, 2.04, 2.05, and 2.06 of the Texas Savings and Loan Act have been complied with . . . ."[47] The Austin court of appeals, which had previously rendered the *Gonzales* decision, held that the order was valid and distinguished that case on the grounds that the findings of the commissioner in *Gonzales* were contested on the merits, but were never seriously at issue in this case, and that Bay City Federal Savings & Loan Association did not contend that it was harmed by the commissioner's failure to follow the statutory requirement.[48] Likewise, the court of appeals pointed out that the complaining parties in *Gonzales* also argued lack of substantial evidence to support the findings which were not accompanied by statements of underlying facts. However, in *Bay City* the findings that the prerequisites of sections 2.02-2.06 had been

[44] *Id.* at 456. The commissioner's order in this case tracked the statutory language of rule 2.4 of the commission's Rules and Regulations for Savings and Loan Associations and TEX. REV. CIV. STAT. ANN. art. 852(a), § 2.08(2) (1964).

[45] Gonzales County Sav. & Loan Ass'n v. Lewis, 461 S.W.2d 215 (Tex. Civ. App.—Austin 1970); *see* Guinn & Hawke, *supra* note 1, at 232-33.

[46] 474 S.W.2d 459 (Tex. 1971).

[47] *Id.* at 461.

[48] Bay City Fed. Sav. & Loan Ass'n v. Lewis, 463 S.W.2d 268 (Tex. Civ. App.—Austin 1971).

complied with were never seriously in issue at the administrative level or in the trial court.

The supreme court in *Gonzales* pointed out what appeared to be a variance between these two court of appeals decisions; they seemed to have placed a different construction upon section 11.11(4) of the Savings and Loan Act, and its application to the commissioner's order. For this reason the high court granted writs of error in both cases. The court promptly came to the conclusion that *Gonzales* was correct, and that *Bay City* had been improperly decided.

In *Gonzales* the supreme court held that the requirement of section 11.11(4) applies only to findings of fact in the commissioner's orders which are set forth in statutory language.[49] When the findings are made in the language of rules and regulations that do not embody statutory language, they need not be accompanied by a concise and explicit statement of the underlying facts. The findings of fact in *Gonzales* were set forth in statutory language and contained no statement of underlying facts to support the required findings, so the court concluded that the commissioner's order was invalid. The supreme court could not agree that the distinctions which the court of appeals had drawn between *Gonzales* and *Bay City* relieved the commissioner from complying with the mandatory provision of section 11.11(4). This provision specifically requires that when the findings of fact *are in statutory language*, they "shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."[50] This part of the Act was not conditioned upon whether the findings were contested on the merits, whether lack of substantial evidence was urged, or whether the complaining party alleged that he was harmed by the commissioner's failure to comply with the law.[51]

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[49] TEX. REV. CIV. STAT. ANN. art. 852(a), § 2.08 (1969) prescribes the findings of fact which are required before the commissioner may approve a charter application.

[50] *Id.* § 11.11(4).

[51] One strange twist, common to both of these decisions, is that after the supreme court had passed upon the issues discussed, it then took up the ancillary contention made by the litigants, that neither of the commissioner's orders were reasonably supported by substantial evidence. The court concluded that both orders of the commissioner were reasonably supported by substantial evidence. Justices Pope, Calvert, and Steakley were of the opinion that this issue should not have been passed upon, and so stated in their concurring opinions to both decisions. The author must agree with Judge Pope, that it is somewhat difficult to see how the majority can conclude that the orders were reasonably supported by substantial evidence when the commissioner has not made the requisite findings of underlying facts under art. 852(a), § 11.11(4). After all, upon preparing such findings he might find that the facts will not support his present order.

This part of the holding led to an interesting disposition of the case. After the district court remanded *Bay City* to the commissioner pursuant to the mandate of the supreme court, the commissioner set a hearing "for the limited purpose of complying with the opinion and judgment of the supreme court." At that hearing the commissioner limited the evidence received to those findings which the supreme court had not held supported by substantial evidence, *i.e.*, those required by § 2.08(11) of art. 852(a). Bay City then notified the commissioner of its complaint concerning the limited hearing, and at the hearing filed an instrument denominated "Motion to Reopen Hearing." In support of that motion, Bay City tendered the testimony of Dr. James R. Vinson to demonstrate that economic conditions in the geographic area were contrary to the findings of the commissioner in the initial order, at least that the economic conditions had worsened in the intervening years. The commissioner overruled the motion to reopen the hearing. The district court sustained the commissioner's order and the Austin court of civil appeals affirmed. The court ruled that since the supreme court had specifically affirmed the previous court of appeals decision on the substantial evidence issue, it was obviously the intent of the high court to remand the case to

A litigation which has been thoroughly discussed on a multitude of legal points in two preceding *Surveys* was once again before the supreme court last year.[52] In *Texas Aeronautics Comm'n v. Braniff Airways, Inc.*[53] the commission had granted a certificate of public convenience and necessity to Southwest Airlines to provide intrastate commuter service between Dallas/Fort Worth, Houston, and San Antonio. Braniff Airways, Inc. and Texas International Airlines, Inc. contested Southwest's application for the certificate before the commission, and challenged the commission's order granting the certificate in the courts. Ultimately, the order was upheld by the Texas Supreme Court.[54]

After the proceedings concerning the certificate had run their full administrative and judicial course, but before Southwest could initiate commuter service, Braniff and Texas International filed a motion with the commission to reopen the certification hearing for the purpose of requiring Southwest to show cause why its authority to operate under the certificate should not be amended, suspended, conditioned, or revoked. On May 13, 1971, the commission denied the motion. On May 19, 1971, Braniff and Texas International appealed to the appropriate district court from the order denying their motion.[55] On June 3, 1971, Braniff and Texas International amended their pleadings in the district court and asked that Southwest be restrained and enjoined from making any changes in its form of operation from that proposed in its application for the certificate. On June 16, 1971, Braniff and Texas International filed a second amended petition in which they requested among other relief, an order restraining the commission from taking certain actions with respect to Southwest's proposed changes in operation. That same day the district judge, without hearing or notice to either Southwest or the commission, granted the requested restraining order.[56] The commission and

the commissioner for the limited purpose of correcting the procedural deficiencies of the order by supplying the underlying facts required by art. 852(2), § 11.11(4). Further, the supreme court decision neither required nor permitted the commissioner to reopen the hearing for evidence on those findings which it had already held to be supported by substantial evidence. Bay City Fed. Sav. & Loan Ass'n v. Lewis, 486 S.W.2d 116 (Tex. Civ. App.—Austin 1972). For a similar holding in the *Gonzales* case, see Gonzales County Sav. & Loan Ass'n v. Lewis, 486 S.W.2d 176 (Tex. Civ. App.—Austin 1972).

The meaning and effect of the above two decisions was evidently not lost upon the savings and loan commissioner. In a subsequent decision, Citizens of Tex. Sav. & Loan Ass'n v. Lewis, 483 S.W.2d 359 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*, the order of the commission granting a new charter to the Baytown Savings Association was upheld by the court, over a contention that it did not comply with the concise and explicit statement of underlying facts requirement of § 11.11(4) of art. 852(a). Here, however, the commissioner's order contained affirmative findings on the standards of public need, volume of business, and that existing institutions would not be unduly harmed.

[52] Texas Aeronautics Comm'n v. Betts, 469 S.W.2d 395 (Tex. 1971); *see* Guinn, *Administrative Law, Annual Survey of Texas Law*, 24 SW. L.J. 216, 226 (1970). *See also* Guinn, *Administrative Law, Annual Survey of Texas Law*, 25 SW. L.J. 201, 206 (1971).

[53] 454 S.W.2d 199 (Tex. 1970), *cert. denied*, 400 U.S. 943 (1971).

[54] *Id.*

[55] At the time this case was argued before the supreme court, the appeal from the commission's order denying reconsideration of the certification was still pending before the district court of Travis County. The court was careful to note in its concluding paragraph that the injunctive relief which was granted against the district judge did not disturb or impair that appeal. 469 S.W.2d at 399.

[56] The order restrained the Texas Aeronautics Commission 'from accepting for filing or from approving the rates heretofore sent to the Defendant Commission by Defendant Southwest Airlines Co. or any other rates, fares and charges which may hereafter be proposed by Air Southwest Co. at the hearing upon the basis of which the order authorizing the issuance of the certificate was en-

Southwest then brought suit in the supreme court seeking a writ of mandamus ordering the district judge to vacate the restraining order and to grant no further injunctive relief which would interfere with the supreme court's judgment which upheld the issuance of the original certificate.

The principal complaints of Braniff and Texas International, which precipitated the restraining order in the district court, were that Southwest intended to utilize a type of aircraft other than the one specified in its original application. Further, the rates and schedules now proposed by Southwest were not the same as those set forth in the 1967 application.

In rejecting the first contention, the court concluded that although Southwest now planned to use new jet aircraft instead of second-hand turbo-jets, the certificate approved by the court required only that Southwest utilize "Federal Aviation Agency certified aircraft of any gross takeoff weight."[57] The proposed aircraft met this requirement. As far as the rate and schedule changes were concerned, the court made it clear that the certificate approved by the court's prior judgment did not require, as a condition or limitation, that the rates and schedules contained in the 1967 application must be maintained.

The court then concluded that the record indicated that Southwest proposed to operate in compliance with the certificate of public convenience and necessity. The injunctive relief which had been requested and granted by the trial court was unnecessary and interfered with the supreme court's former judgment. Although the order of the district court dated June 16, 1971, had expired and mandamus was thus no longer necessary, the supreme court did enjoin the district judge from further interference with its former judgment.

III. JUDICIAL REVIEW

Scope of Judicial Review. The *Survey* period produced one of the few reported cases[58] concerning the validity of article 581-27, the de novo review provision of the Texas Securities Act.[59] The commissioner had revoked the secondary trading exemption[60] of Intercontinental Industries, Inc. for making

> tered . . . .' The order also restrained the Commission from accepting for filing or from approving schedules which Southwest Airlines Co. had proposed unless they were identical with those proposed at the earlier hearing in 1968. The order further restrained the Commission from permitting Southwest Airlines Co. to offer any air service other than 'the same service under the same terms and conditions as previously granted by the Commission' to Southwest Airlines Co.

Id. at 396.

[57] *Id.* at 397.

[58] Holladay v. Intercontinental Indus., Inc., 476 S.W.2d 779 (Tex. Civ. App.—Austin 1972), *error ref. n.r.e.*

[59] TEX. REV. CIV. STAT. ANN. art. 581-27 (1964) provides in part:

> Any dealer, salesman or applicant aggrieved by any decision of the Commissioner may file within thirty (30) days thereafter in the District Court of Travis County, Texas, a petition against the Commissioner officially as defendant . . . . [A]ll appeals to the District Court shall be tried by such court as a trial de novo as that term is used in an appeal from Justice of the Peace Court to a County Court, as if there had been no previous determination or hearing on the matters in controversy, and under no circumstances shall the substantial evidence rule as interpreted by the courts of Texas ever be applied to appeals taken under this Act.

[60] Secondary trading of securities applies to those securities which are presently out-

false and misleading statements to prospective investors, and for failing to provide them with accurate financial information about the corporation.[61] Intercontinental appealed this order to an appropriate district court, where the issue arose as to whether the cause should be tried de novo or under the substantial evidence rule. The trial judge ruled that the trial should be de novo, and when the commissioner refused to amend his pleadings and assume the burden of proof, the court sustained Intercontinental's motion for judgment.

The commissioner raised three points of error on appeal. The first was that the Act did not provide for judicial review in such a case, and that the only remedy available to the litigant was an administrative hearing before the commissioner.[62] In rejecting this point, the Austin court of civil appeals relied upon the final paragraph of article 581-5, which authorized "[a]ny interested party aggrieved by any decision of the Commissioner . . . [to] appeal to the district court of Travis County . . . in the manner provided by Section 27."[63] Chief Justice Phillips explained that although the quoted language is found in a paragraph dealing with the commission's power to revoke or suspend recognition of a securities manual, "this language applies to any decision of the Commission wherein a party is aggrieved."[64]

The second alleged error raised by the commissioner was that the trial court, as a matter of statutory construction, had improperly applied article 581-27 to this litigation. The court of appeals believed that the provision in article 581-27 allowing *any* dealer, salesman, or applicant the right of appeal to the district court was broad enough to include Intercontinental, which was dealing in its own stock.

The final, and the most important, issue raised on appeal was related to the constitutionality of the de novo review provision. The appellant asserted that article 581-27 delegated to the courts purely administrative functions involving public policy, and thus presented the court with a legislative question which cannot properly be committed to the courts under the separation of powers provision of the Texas Constitution.[65]

The court overruled this contention and upheld the validity of the de novo provision. Relying upon the test for distinguishing legislative from judicial questions as set forth in the supreme court decision of *Key Western Life Insurance Co. v. State Board of Insurance*,[66] the court of civil appeals concluded

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standing as contrasted with securities that have not previously been issued or sold. Trading in these shares is expressly exempted from the requirements of the Texas Securities Act. *Id.* art. 581-5(O).

[61] The commissioner may revoke a secondary trading exemption if "he has reasonable cause to believe that the plan of business of the issuer of such security, the security, or the sale thereof would tend to work a fraud or deceit upon any purchaser or purchasers." *Id.*

[62] The commissioner based this contention upon the wording of art. 581-5(O), the concluding sentence of which provides that the order of revocation is "to be subject to review in the manner provided by Section 24 of this Act." *Id.* Article 581-24 deals with the right of any person to request a hearing before the commissioner. The commissioner asserted that the Act is wholly silent as to any further procedure beyond the hearing before the commissioner as provided in art. 581-24. Thus, there was no provision for appeal to the courts.

[63] *Id.* art. 581-5(O).

[64] 476 S.W.2d at 780.

[65] TEX. CONST. art. XI, § 1.

[66] 163 Tex. 11, 350 S.W.2d 839 (1961).

that the issues involved were clearly judicial. Intercontinental's secondary trading rights were withdrawn under specific charges of wrongdoing. According to the court, the important consideration was not that the administrative action called for by the Act involved public policy or was, in effect, policy making, but rather that it was an action concerning only the parties who were immediately affected.

There are numerous Texas cases dealing with the problem of the constitutionality of de novo review provisions from administrative orders.[67] The validity of de novo review turns upon what Judge Reavley referred to as that subtle distinction between judicial and legislative functions.[68] In distinguishing the two functions, the court in *Key Western* placed great emphasis upon whether the legislation in question had vested considerable discretion in the agency, and whether the action of the administrative agency was "particular and immediate," rather than, as in the case of rule making, "general and future in effect."[69] If the legislation vested relatively little discretion and the action was "particular and immediate," then the function must be classified as judicial.[70]

It appears that the court properly applied this test to the case under discussion, at least in relation to the specific function of the commissioner that was subject to review, *i.e.*, revocation of the litigants secondary trading exemption based upon specific acts of misconduct. Under the statute, the commissioner could revoke the exemption only in an instance where "fraud and deceit" was perpetrated upon the purchaser. The effect of the order was certainly "particular and immediate."

The Substantial Evidence Rule. Probably the most celebrated decision rendered by the supreme court in the area of administrative law in 1972 was *Lewis v. Southmore Savings Ass'n.*[71] Southmore Savings instituted the action in the district court, seeking a reversal of the savings and loan commissioner's order granting an application for a charter to 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 court of civil appeals, however, reversed the commissioner's holding, primarily because it was of the opinion that inadmissible hearsay evidence had substantially influenced the decision of the administrative agency.[72] Specifically, Dr. Francis S. Yeager, who was characterized as a "research economist," had given certain opinion testimony about public need, volume of business sufficient to indicate a profitable operation, and absence of undue harm to existing associations. Yeager's testimony was based largely upon material that was not properly

[67] To mention only a few of the more famous, Gerst v. Nixon, 411 S.W.2d 350 (Tex. 1966); Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427 (Tex. 1963); Key W. Life Ins. Co. v. State Bd. of Ins., 163 Tex. 11, 350 S.W.2d 839 (1961).

[68] Reavley, *supra* note 17, at 250.

[69] 163 Tex. at 23, 350 S.W.2d at 847.

[70] For an excellent discussion of some of the inherent problems in attempting to distinguish legislative from judicial functions, see 4 K. DAVIS, *supra* note 26, § 29.10.

[71] 480 S.W.2d 180 (Tex. 1972).

[72] Southmore Sav. Ass'n v. Lewis, 467 S.W.2d 226 (Tex. Civ. App.—Austin 1971); *see* Guinn & Hawke, *supra* note 1, at 245-46.

admitted into evidence and was properly characterized as hearsay. According to the court of appeals 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.[73] Thus, if the evidence upon which the opinion is based is "largely hearsay, nebulous, or of a species deemed unreliable," it should be excluded by the commissioner.[74] The court then concluded that the order was not supported by substantial evidence and stated:

> 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.[75]

The supreme court reversed this holding and concluded that the record reflected competent direct evidence which supported the commissioner's findings. In arriving at this result, the court reviewed the history of the substantial evidence rule—the fundamental concept that where substantial evidence would support either affirmative or negative findings the order must be upheld. After a careful examination of the evidence which was introduced before the commissioner, Judge McGee came to the conclusion that the order was reasonably supported by substantial evidence.

The decision of the supreme court is somewhat enigmatic. First, it represents only the judgment of the court and not the opinion of the court, since only two judges joined Judge McGee's opinion, while six others concurred in the result. It is the opinion of the author that this substantially diminished the value of the case as precedent. Further, Judge McGee flatly asserted that the hearsay rule applies in administrative hearings just as it does in court, and that it is a rule that forbids the reception of evidence rather than one that merely goes to the weight of the evidence.[76] The author seriously doubts that this is the law in Texas, and if it is, it will certainly come as a great surprise to Texas administrative agencies and the counsel that practice before them. Perhaps it was this assertion which caused six judges to concur only in the result. Another important facet of the *Southmore* decision is that the court appears to be moving very close to an outright application of the famed residuum rule.[77] Under this concept, in order for the administrative findings

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[73] 467 S.W.2d at 230.

[74] *Id.*

[75] *Id.* at 239.

[76] 480 S.W.2d at 186. Judge McGee did emphasize, however, that "in administrative hearings considerable discretion is permitted in allowing evidence to be introduced by virtue of the liberal exceptions to the rule." *Id.*

[77] "Under this rule it is said that a finding cannot be supported by substantial evidence unless at least a residuum of the supporting evidence would be competent under the exclusionary rules. For example, if the supporting evidence were all hearsay, it could not be deemed substantial." 1 F. COOPER, STATE ADMINISTRATIVE LAW 405 (1965). The merits of the rule are fully discussed in 2 K. DAVIS, *supra* note 26, §§ 14.10-.12, and in F. COOPER, *supra*, at 404-12.

to be supported by substantial evidence, there must be a residuum of evidence that would be competent under the exclusionary rules.[78]

The court also appears to have rejected the court of appeals "substantially influenced test" with respect to the level of tolerance for the percentage of hearsay or other incompetent evidence that will be permitted in an administrative record.[79] The court seemed to indicate that the important question is whether there is some legally competent evidence (perhaps more than a scintilla) in the record to substantiate the order, and not how much or what percentage of the record is composed of legally inadmissible evidence.

[78] Judge McGee's specific comment upon the quality of the evidence was as follows:

> The record reflects competent direct evidence, a part of which is set out above, which supports both disputed findings of the Commissioner. It is within the discretion of the Commissioner to admit and consider the expert opinion by considering the weight and credibility of the supporting evidence which formed the basis for his opinion. That testimony as to the basis for the opinion is not hearsay in the true sense.

480 S.W.2d at 187.

[79] *See* text accompanying note 75 *supra.*