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PART III: PUBLIC LAW

ADMINISTRATIVE LAW

by

John L. FitzGerald*

PROFESSOR Frank E. Cooper's recent two-volume work, State Administrative Law, gave the legal profession its first comprehensive survey of administrative law as it has developed in the states. His pioneering furnishes a useful outline into which future state-wide studies may be fitted thereby helping to make this indifferently-indexed area of the law the subject of practical discovery. This Article will follow Cooper's outline so far as possible.

I. BASIC CONSIDERATIONS

A. Separation Of Powers: Constitutional Tests

The Texas Constitution, article II, section 1,* reads:

"The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Because of this separation of powers doctrine, the supreme court, although recognizing exceptions in certain areas, either has declared statutes requiring complete de novo review of agency findings unconstitutional or construed them as requiring application of the substantial evidence rule by the reviewing court. This attitude was modified in Southern Canal Co.

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COOPER, STATE ADMINISTRATIVE LAW (1965) has established a pattern for this Texas Survey in his survey of Michigan administrative law, Cooper, Administrative Law, 11 WAYNE L. REV. 19 (1964). Since Michigan has an Administrative Procedure Act, MICHIGAN COMP. LAWS §§ 3.560(21.1), and Texas does not, this survey must depart from Professor Cooper's format to some extent. Compare TEX. REV. CIV. STAT. ANN. art. 6252-12 (1962), which provides a comprehensive state procedural act but is applicable only to rules of practice, procedure and organization.

TEX. CONST. art. 2, § 1.

Roughly defined, the Texas substantial evidence rule is that administrative findings of fact are conclusive if supported by substantial evidence, i.e., more than a mere scintilla of evidence, with rational probative force. This rule is applied by the trial court sitting de novo. For an excellent basic article on this subject see Larson, The Substantial Evidence Rule: Texas Version, 5 SW. L.J. 152 (1951). The recognized exceptions are review of public utility rate orders in which "constitutional" or "jurisdictional" fact issues were raised, industrial accident awards, and certain orders of the Board of Insurance Commissioners.
v. State Bd. of Water Eng'rs* and Key W. Life Ins. Co. v. State Bd. of Ins.*
to allow the legislature more latitude in providing for complete de novo review. As re-emphasized by Chemical Bank & Trust Co. v. Falkner* the legislature may provide for complete de novo review if (1) it does this by clear and specific statutory provision so that it is difficult for the court to construe the statute as merely meaning a substantial evidence type of judicial scrutiny,* (2) if the administrative proceeding is adjudicatory in nature,* and (3) if the statutory standards furnished the agency are neither of a legislative nor administrative policy nature.* Some cases also lay stress on the presence or absence in the statute of a provision automatically vacating the administrative order upon appeal,* but this factor should be considered an interpretative aid rather than a *sine qua non* of complete de novo review.* The past year has not seen the development of especially significant judicial doctrine in regard to de novo review, though there have been some cases of interest.

De novo judicial review provisions of the Texas Liquor Control Act* were declared void in a court of civil appeals decision** as a violation of the separation of powers provision of the Texas Constitution.* The court reviewing cancellation, after hearing, of a liquor permit by the Texas Liquor Control Board, found the judicial review provisions specific in their requirement that a de novo review be accorded. Considered to be controlling

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* 119 Tex. 227, 318 S.W.2d 619 (1958) (invalidating a judicial review provision of a state which required review de novo).
* 163 Tex. 11, 350 S.W.2d 839 (1961) (upholding a de novo judicial review statutory provision).
* 369 S.W.2d 427 (Tex. 1963) (invalidating a de novo judicial review statutory provision).
* Id. at 431.
* Id. at 432.
* Ibid.
* Tex. Const. art. 2, § 1.
precedent was Scott v. Texas State Bd. of Medical Examiners\(^{16}\) which held that the Board’s action of revoking a doctor’s license was subject to complete de novo review because the proceeding was adjudicatory in nature and because it did not involve determination of legislative policy. The court held that it would not be permissible to give such a complete review to the administrative action of cancelling a liquor permit because it was based on legislative policy. One of the standards in the act governing permit cancellations was “the general welfare, health, peace, morals and safety of the people, and . . . the public sense of decency.” The court also seemed concerned by the fact that the statute did not contemplate that the agency order should be vacated while the proceeding was before the court which is the statutory basis used by the supreme court to sustain de novo review in Industrial Accident Board cases. While this basis occasionally is referred to in other circumstances, it does not form a cornerstone of the doctrine of complete de novo review in most Texas cases.\(^{17}\)

While Texas courts have recognized an increasing number of situations in which the legislature constitutionally may provide for complete de novo review of administrative action, this does not cause the courts to construe a provision for de novo trial upon appeal, couched in general terms, to preclude the necessity of applying the substantial evidence rule. In Firemen’s & Policemen’s Civil Serv. Comm’n v. Hamman\(^{18}\) a policeman, suspended under civil service rules, contended on appeal that it was necessary for facts to be proved by a preponderance of the evidence. The supreme court denied the contention stating that “a substantial evidence trial is a trial de novo. . . . The Legislature did not . . . purport to provide for or require a de novo trial on appeal in the full sense.”\(^{18}\) With Hamman should be compared Harrison Clinic Hosp. v. Texas State Bd. of Health.\(^{19}\) In this case the Board cancelled a hospital’s temporary license. On appeal the hospital argued for

\(^{16}\) 384 S.W.2d 686 (Tex. 1964). The case held that revocation of doctor’s license by a state board, under alleged circumstances of drug prescriptions being filled for persons who were habitual narcotic addicts, was subject to independent judicial review to determine the correctness of the revocation. The proceeding was not only adjudicatory, but also it did not involve determination of legislative policy. The statutory criterion applicable to revocation was “grossly unprofessional or dishonorable conduct of a character which, in the opinion of the Board, is likely to deceive or defraud the public.” The court found the substantive standard sufficiently definite (presumably to sustain fact finding by the court under past precedent) and noted that at an earlier time the court had been charged with the statutory power to revoke medical licenses. It further found that a policy discretion was not intended by use of the discretionary words “in the opinion of” since a reasonable exercise of discretion must be implied. This is in accord with Texas precedent. See, e.g., Nichols v. City of Dallas, 347 S.W.2d 326 (Tex. Civ. App. 1961) error ref. n.r.e. (zoning case). See also Davis, Administrative Law § 7.02 (1959) for a sound and practical distinction between “quasi judicial” and “quasi legislative” proceedings to be conducted by administrative tribunals. Davis’ adjudicative and legislative fact discussion is also instructive.

\(^{17}\) Cf., Chemical Bank & Trust Co. v. Falkner, 369 S.W.2d 427, 433 (Tex. 1966).

\(^{18}\) 404 S.W.2d 108 (Tex. 1966).

\(^{19}\) Id. at 311-12.

a complete de novo trial under section 9 of article 4437f\textsuperscript{21} which provides that "the proceedings on appeal shall be a trial de novo as such term is commonly used and intended in an appeal from the Justice Court to a County Court." The court of civil appeals agreed with the appellant hospital and held that review should have been de novo pursuant to the ruling in 
\textit{Scott} \textsuperscript{22}. The court stressed the fact that revocation of a license is adjudicatory in nature as it involves primary fact finding related to past licensing conduct. But the court did not discuss whether the fact that only a temporary license was involved was at all indicative of the presence of legislative policy questions. The Board appealed the court of appeals decision strongly contending that because it had issued only a temporary certificate to the hospital and in effect had denied an application for a permanent license, its action should not be deemed a revocation proceeding (adjudicatory) but a proceeding in which an initial license is being denied (a determination of legislative policy). The Board argued that complete de novo review was incompatible with the broad public policy scope of the statutory standards which included the phrase “conduct detrimental to the public health, morals, welfare and safety of the people of the State of Texas.”\textsuperscript{23}

The supreme court recognized that the statute made no provision for either temporary or permanent certificates, and that, if the Board chose to call this an initial licensing proceeding, the matter must still be pending as the record did not show a refusal of an initial application but a Board order revoking a license. The court alluded to the policy question only briefly, turning its attention to the actual fact finding nature of the proceedings before it. The pleadings of the Board had charged that the clinic: had failed to provide hand-washing facilities for the scrub area of the operating room; had failed to store oxygen and nitrous oxide separately from other gases; did not dispose of surgical and contaminated wastes by incineration; and had maintained an open flame sterilizer in the operating room.

In agreeing that \textit{Scott} controlled and made complete de novo review constitutionally permissible, the supreme court may have added a degree of elasticity to the established rules. Emphasis was placed upon the fact finding nature of the proceeding which "lent itself to decision by the judicial process."\textsuperscript{24} In light of the much greater statutory discretion present here than in \textit{Scott}, it seems apparent that the court is giving weight to the fact that the administrative tribunal had filled in the broad statutory standards to a considerable extent by definitive rules. It would seem that when the facts in

\textsuperscript{22} See note 16 supra.
\textsuperscript{23} Compare Texas Liquor Control Bd. v. Longwill, note 11 supra. Complete de novo review of a liquor permit cancellation was denied, though specifically provided by statute, since the statutory standards included “the general welfare, health, peace, morals, and safety of the people, and . . . the public sense of decency.”
controversy can be adjudicated in light of the context of the rules, complete de novo review will lie. This suggested inference might apply to revocations, suspensions and possibly renewals of licenses or certificates. It finds no support, however, in initial licensing cases because of the prospective nature of the administrative decision involved. A like argument could prevail in renewal proceedings which also are predominantly prospective. However, renewal proceedings can involve constitutional rights in property due to investments made upon the strength of a license having been granted, and this factor could distinguish renewal proceedings from initial licensing proceedings. Projections of conclusions into the future need not be a deterring factor for complete de novo review if the conclusions must be based upon ascertainable factual criteria.

Sponsors of revision of the Federal Administrative Procedure Act of 1946 seem to be discarding earlier-held ideas that initial licensing partook more of the exercise of the legislative than the adjudicatory function. Perhaps a more flexible ad hoc determination of when complete trial de novo could be obtained would be simpler than a generalized test depending on the nature of the function, i.e., whether the agency action is taken under a law conferring legislative policy discretion on the agency. An agency may not be required to bring its legislative policies into play in every case. Also, its rules may have given specific contours to its broad discretions so that it would not be beyond the jurisdiction of the judiciary to redetermine the agency action as a matter of fact finding. If the exercise of policy discretion had no significant part in the case before the court no constitutional reason should require denial of complete de novo review.

This suggestion seems to underlie a provision of the 1952 Hobbs Act. Section 7b of that act provides that if a hearing was not required by law and a genuine issue of material fact is presented, the United States Court of Appeals on review can transfer the case to the United States District Court for the district in which the petitioner resides or has his principal office for hearing and for determination just as though the proceedings were originally initiated in the district court. This by inference is trial de novo.

27 5 U.S.C. §§ 1031-42 (1964). These sections make judicial relief available with respect to certain final orders of the FCC, the Agriculture Department, the Maritime Commission, the Federal Maritime Board, and the AEC.
29 Professor Cooper, appraising the reaction of the various states courts to assuming de novo review of executive action when statutes so provide has said, "[W]here performance of administrative duties will not interfere with the proper fulfillment of the court's higher responsibilities—and especially where the assumption of such duties will provide a check against possibilities of abuse of administra-
B. Delegation Of Powers

City of San Antonio v. Texas Water Comm'n,
affirmed both lower courts which had held that the Texas Water Rights Commission had not delegated its supervisory power illegally under the statutes providing for Commission approval of permits to withdraw water from the streams of the state. Both the city of San Antonio and the Guadalupe-Blanco River Authority applied for permission to withdraw water from the same watershed for municipal purposes. After comparative balancing of public interest considerations the city's application was denied. The city complained that the permit granted the Authority included a grant of all unappropriated water in the shed up to 50,000 acre feet per annum conditioned only upon (1) use thereof for municipal purposes, and (2) approval by the Commission of any contracts for such use entered into by the Authority with any municipality. It was contended that this gave the Authority control over which cities it would supply and allowed it to deny use of water to a city which did not write a satisfactory contract. In sustaining the Commission's position, the court held that the Commission had wide statutory discretion to determine whether to grant or deny an application for permits to appropriate water to a particular use, that its future supervisory power, both under its statute and under the terms of the permit, adequately retained in the Commission the powers which the legislature intended it should exercise in behalf of the state. The court noted that the Commission had other statutory powers it could invoke if the water were not sold at reasonable rates or was disposed of in a discriminatory manner. Further, the permit issued by the Commission expressly required the Authority to comply with the laws, rules, regulations and orders of the Commission. The court observed that the Authority also had statutory obligations and had acknowledged the Commission's continuing supervisory powers in its brief.

C. Notice: Constitutional Right To Notice

In City of Houston v. Fore, the city made certain improvements to a street upon which the defendant's property abutted. The ordinance which authorized the improvements set a per foot assessment, provided a time and date for hearing, and provided that notice of the hearing be published in the Houston Press three times. The defendant did not read the notice and having no knowledge of the hearing he did not attend. Article 1105b, section 9 requires notice to abutting property owners specially assessed but permits the kind of constructive notice given here. The record showed that the defendant-owner had resided at the property in question for twenty-four years; that his address was on the tax rolls of the city and thus was known to the city; and that the city had in fact addressed communications on other matters to the defendant at his address. The court of civil appeals held the notice by publication insufficient because it was not reasonably calculated to apprise interested parties of the pendency of the action. Where the names and post office addresses of those affected by a proceeding are known or easily obtainable, notice by publication is inadequate under the due process clause of the fourteenth amendment to the United States Constitution.

It was contended in a court of civil appeals that an amendment of the Austin zoning ordinance was defective on grounds of due process in that the statutory notice provided for in such proceedings did not meet constitutional requirements. The particular defect urged was that the statutory provision only provided for notice to the owners of record in the latest city tax poll. The complainant failed to render his property, and therefore received no individual notice, though notice by publication was provided. The court held that it was reasonable for the legislature to impose upon property owners the obligation to render to the city value estimates upon their property, and had the complainant in the present proceeding done

7307 (1954). The Board is authorized to adopt rules and regulations that are reasonable and not in conflict with the statute. Tex. Rev. Civ. Stat. Ann. art. 7301 (1954). It is given authority over the charging of reasonable rates. Tex. Rev. Civ. Stat. Ann. art. 7653 (1954). Provision is made for notice and opportunity for public hearing upon an application to appropriate water to be given any claimant or appropriator of water from the source of water supply. Tex. Rev. Civ. Stat. Ann. art. 7508-09 (1954). The statutory provisions dealing with the subject are numerous, and these references do not purport to cover all of them. Since the court found the permit reserved to the Commission power to act on a continuing basis, the court's decision seems correct.

34 U.S. Const. amends. II & IV. This case is in accord with several recent cases handed down by the Supreme Court of the United States which recognize that when certain property owners to be assessed are singled out from among property owners generally because city improvements specially improve their property, there is a personal right to be heard. See, e.g., Schroeder v. City of New York, 371 U.S. 208 (1962) (eminent domain).
35 Lawton v. City of Austin, 404 S.W.2d 648 (Tex. Civ. App. 1966). For further discussion see, Larsen, Property, this Survey at footnote 32.
so he would have received individual notice. The court further said that re-zoning is analogous to the adoption of rules, i.e., an exercise of a legislative function and a statute need not meet tests of constitutional due process in legislative type proceedings. The court supported its reasoning by quoting the following statement from an earlier case: "[I]n Legislation or rule-making, there is no constitutional right to any hearing whatsoever." This tends, however, to articulate an absolute precept in regard to agency rule-making that unduly and unnecessarily restricts the scope of judicial review of administrative action. Under circumstances more serious than those involved here, this precept could have substantial adverse effect upon personal and property rights. It is doubtful that in all instances the standards applicable to the legislative process must be equally applicable to rule-making by the agencies. No comparable inflexible parallels are drawn between administrative adjudications and judicial trials.

D. Hearing: Constitutional Right Of Hearing

It is probably too early to assess how wide an effect House of Tobacco, Inc. v. Calvert may have. Taking an analytical approach, the court finds the power of revocation of cigarette distributors' licenses within the purview of the tax statutes rather than the police powers of the state, and therefore, the precedents which have supported more high-handed exercises of discretion in the police power field do not control. The court then takes a

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29 See the discerning article, Fuchs, Constitutional Implications of the Opp Cotton Mills Case With Respect to Procedure and Judicial Review in Administrative Rule-Making, 27 Wash. U.L.Q. 1 (1941). See also FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949); The Assigned Car Cases, 274 U.S. 154 (1927); Ohio Valley Water Co. v. Ben Avon Borough, 213 U.S. 287 (1920); Londoner v. City & County of Denver, 210 U.S. 373 (1908); Jordan v. United Ins. Co. of America, 289 F.2d 778 (D.C. Cir. 1961); Glen Oaks Util. Inc. v. City of Houston, 161 Tex. 417, 340 S.W.2d 783 (1960) (rate case involving a number of utility companies); City of Houston v. Glen Oaks Util., Inc., 360 S.W.2d 149 (Tex. Civ. App. 1962) error ref. n.r.e. Cooper, op. cit. supra note 1, at 142, observes that classifying the agency's function as legislative or judicial does not necessarily determine whether a notice and hearing must be given: "In fact hearings are required in some types where the agency's function is essentially legislative in character, if the considerations . . . dictate the advisability of insisting on a hearing." The "considerations" he has reference to, without attempt to detail them all, mainly concern whether the issues before the court call for striking a balance between public need for expediting the accomplishment of a public objective, and the countervailing private interest that there be full consideration of the "rights and privileges" of the affected parties before any official action is taken; further, will the judicial type of inquiry best reveal the truth, rather than private investigation and inspection by the administrative tribunal. Professor Cooper concludes that recent cases less frequently use the suggestion of some older cases and texts that whether notice and hearing is required depends on the determination of the agency's function as legislative or judicial. Earlier Professor Fuchs had said: "Where economic control of private business enterprise is the purpose of regulation, the practice of according procedural formalities to affected interests in rule-making as well as in framing orders of specific application is especially applicable. . . . Procedural formality may be expected to increase roughly in proportion to the directness with which economic regulation affects the financial condition of the affected business enterprises. . . ." Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259, 268 (1938).
30 Cf. Miller v. County of Los Angeles, 341 F.2d 964 (9th Cir. 1965).
31 394 S.W.2d 614 (Tex. 1965), 19 Sw. L.J. 845.
next step in the “valuable privilege” direction by comparing a license to distribute cigarettes to a license to practice dentistry. Hopefully this case initiates a turn about from the tortured holdings that “useful” occupations or professions warrant adequate due process procedure but “non-useful” occupations do not. The need for intensive and reasoned judicial re-examination of the precedents governing due process requirements in licensing has been emphasized by others. Perhaps no better reason for reform exists than economic realism, for regardless of the fact that legislatures may provide in statutes that no property right is conferred by a license, statutes nonetheless proceed to condition and restrict licensing at length. What in earlier days might have been simple regulations with needs-of-the-treasury overtones have now become exhaustive and comprehensive regulations limiting the right to work and to live. Under such conditions the right to due process should be recognized in simple fairness and justice.  

II. RULE-MAKING: DISTINCTION BETWEEN RULE-MAKING AND ADJUDICATION

In Pickens v. Railroad Comm'n the Texas Railroad Commission, after holding hearings as required by statute, issued an order prorating the amount of gas that might be produced in an oil field within two Texas counties. The court found that the order was supported by competent substantial evidence, and that the trial court committed no error in admitting on appeal exhibits of technical data obtained after the Commission's order was issued. The court commented that the data were admitted only to the extent they revealed conditions actually in existence at the time of the agency order. Further, no error was found in acceptance by the Commission of particular legislative orders proposed for a resolution of the hearing by participants interested in the proceeding. The court defined the character of the Commission's actions as legislative; found that the Commission's acceptance was similar to action which takes place in the legislature itself; and concluded there was no evidence of Commission abdication of duty or delegation of power to private persons. Hence, the exercise of functions in a manner that would give rise to due process questions in an adjudicatory proceeding—basing a decision on matters not of record—does not give rise to such questions in rule-making.

It was contended that the admission of recent evidence in the trial court was violative of the rule that the agency order be tested by conditions existing when the agency acted. This contention was rejected by the supreme court because the recent evidence was admitted upon a limited fact basis consistent with according full recognition to the expert status of the Coop-

41 Compare Cooper, op. cit. supra note 1, at 140-42.
42 387 S.W.2d 35 (Tex. 1965).
mission. Realistically such an issue has only occasional impact in light of
(1) the usual omission of basic findings from Railroad Commission orders
(which if included, presumably would point to the kinds of evidence which
the Commission deemed material in the administrative proceeding), and
(2) the freedom to introduce a complete de novo case in the district court
upon appeal, which was exercised in this case. The court noted that "the
record made before the Commission is not before us, and no attempt was
made to introduce it into evidence.'

III. ADJUDICATION

A. Requirements As To Notice

Right To Be Advised of Nature of Claim. In a court of civil appeals
case" the plaintiff complained that he was not given adequate notice under
the statutes. It was held that the same rule will be followed as in civil trials.
Since a party's appearance in a civil action amounts to a waiver of service or
of any irregularity therein, the same rule applies to one appearing at a hear-
ing before an administrative body such as a board of adjustment for a mu-
nicipality, or to one who did not receive the statutory notice provided in
the Air Pollution Board's statutes but attended a meeting of the Board and
was allowed to present testimony in opposition to the order granting a per-
mit.

Form and Content of Notice. In Firemen's & Policemen's Civil Serv.
Comm'n v. Hamman,' the Texas statute7 involved was specific in its re-
quirements for the service of charges upon policemen in disciplinary pro-
ceedings and included a prohibition against introducing evidence under
charges arising from events that occurred more than six months before the
charges were filed. The statement of charges was not subject to amend-
ment. A second statement of charges filed against a police officer depended
upon proof of events occurring within the six-month period preceding the
first charge. The supreme court reversed the court of civil appeals decision
which had invalidated this procedure as lending itself to a circumvention
of the statute. The high court read the statute according to its terms as not
having application to a second, separate complaint. The decision seems
overly technical. The supreme court no doubt recognized the problems of
cities in administering efficient police forces and considered this an im-
portant area for administrative latitude, as it no doubt is. But the apparent

43 Id. at 45.
error ref. n.r.e. See also, Trimble v. Texas State Bd. of Registration for Professional Eng'ts, 387
S.W.2d 876 (Tex. 1965).
46 404 S.W.2d 308 (Tex. 1966).
47 TEX. REV. CIV. STAT. ANN. art. 1269m (1963).
policy of proceeding with fairness and with due deliberation embodied by this statute is equally deserving of appreciation.

B. Hearing Stage

Combination of Functions. Hamman summarily disposed of a contention that a member of the Civil Service Commission is disqualified from participating in the decision of a case because he has previously performed investigatory functions in the case. This view is novel neither in Texas nor elsewhere; but the court added the frequent and important caveat: "We do not hold that under no facts or circumstances would a combination of investigatory and adjudicatory functions constitute a denial of due process of law."

Right To Cross-Examine. In Warren Independent School Dist. v. Southern Neches Corp., the supreme court, in a per curiam opinion, stated that the court of civil appeals was incorrect, though not reversibly so, in finding that action by the Board of Equalization refusing land owners the opportunity to cross-examine witnesses at its hearing was a denial of due process. The Board accorded the owners opportunity to be heard orally on their timberland values and heard evidence of values of minerals which the timber owners contended were not bearing their proportionate share of the tax burdens. The owners, said the court, did not have the further right to cross-examine witnesses at an earlier hearing of the Board held to determine mineral values. The Board had a right so to control its process as to hear evidence on mineral values at one hearing, and evidence on timberland values at a later hearing.

What Evidence May Be Received. Under an unusual provision of the statute establishing an Air Control Board of the State of Texas, the Board must apply the rules of evidence in hearings held upon complaint as are applied in the district courts. Most agencies are not bound by the technical rules of evidence.

C. Post-Hearing Stage

Form of Decisions and Orders. Findings of basic (non-jurisdictional) fact are not required to be expressed in an administrative order, unless the statute provides otherwise. This rule was adhered to in a recent civil appeals case. The statute involved did not require that the Railroad Commission

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48 Firemen's & Policemen's Civil Serv. Comm'n v. Hamman, 404 S.W.2d 308, 312 (Tex. 1966).
49 404 S.W.2d 809 (Tex. 1966).
50 405 S.W.2d 100 (Tex. Civ. App. 1965) error ref. n.r.e.
52 Harris, The Administrative Law of Texas, 29 Texas L. Rev. 213, 221 (1950). The Railroad Commission, with the cooperation of the Bar, in 1966 promulgated rules of procedure for the transportation division, rule 34 of which deals with admissibility of evidence and is essentially similar and equally progressive to the statutory requirement in note 51 supra.
make basic findings of fact supporting the action it took in approving or disapproving the transfer of a motor carrier certificate. However, the statute contained a provision imposing a duty to present any proposed transfer of a certificate to the Commission for approval or disapproval, and empowered the Commission to disapprove the transfer "if it be found and determined" that one of several stated grounds existed—so-called ultimate or conclusionary findings—including the ground that the transfer proposed "is not best for the public interest." The statute also provided that the Commission might take into consideration all requirements and qualifications which applied to "a regular applicant." The Commission approved the transfer and made four conclusionary findings that could be closely identified with the several statutory grounds, with one exception: there was no mention of the "public interest."

The court of civil appeals, carefully following the reasoning of Tarry Moving & Storage Co. v. Railroad Comm'n which had dealt with similar issues in a specialized motor carrier case, held that: (1) the statutory requirement of taking into consideration the "public interest" in a certificate transfer application did not import all of the public interest, convenience and necessity considerations applicable to an initial carrier certification; and (2) failure to make a finding that the "public interest" was served in approving the transfer did not make the order defective since the finding of public convenience and necessity in the initial certification could be incorporated by implication and considered with the four specific findings contained in the order as reasonably amounting to a "public interest" finding. The court of civil appeals seems by analogy in accord with the 1963 supreme court decision; but the decision is questionable because it relies on findings made when the carrier was originally certified. This appears to be unsound statutory construction when applied to a present evaluation of the public interest."

The case is in accord with recent decisions in Texas construing statutes requiring detailed findings of fact. The number of statutory provisions of this kind, however, is inconceivable as yet. In the case of agency orders issued under other statutes, the practice is to accept ultimate findings of the agency, and to indulge the presumption that there are basic reasons adequate to the occasion.

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55 367 S.W.2d 322 (Tex. 1963).
56 Railroad Comm'n v. Walker Transfer & Storage Co., 405 S.W.2d 427 (Tex. Civ. App. 1966) was an action to review a Railroad Commission order granting a specialized motor carrier certificate. The sufficiency of the order was challenged. The statement of facts in the order was as follows: "Because of the seasonal nature . . . of this commodity numerous transportation facilities are necessary . . . and in almost every . . . season certified carriers are required to lease equipment . . . For these reasons, the Commission finds the public convenience and necessity requires the granting of this application." The Motor Carrier Act, Tex. Rev. Civ. Stat. Ann. art. 911b, § 1a(d) (1964), requires that the order set forth "full and complete findings of fact pointing out in detail the inadequacies of the services . . . existing . . . . The court affirmed the trial court judgment declaring the order invalid and held that the two broad generalizations stated in the order were not of a nature specific enough so that a court, upon reading them, can fairly and reasonably say that they either do or do not support the required ultimate statutory findings of inadequacy of services.

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Res Judicata. The supreme court held in Texas Employers' Ins. Ass'n v. Rampy that a denial by the Industrial Accident Board of compensation for disability allegedly occasioned by several heat strokes in 1962 could properly form the basis for refusing a claim presented in 1963. The Supreme Court said that the trial court should have sustained the Board's plea of res judicata, since this doctrine applies to matters passed on or which might have been litigated in the first action between the same parties. The Board's first order had been appealed to and sustained by the district court.

IV. JUDICIAL REVIEW

A. Constitutional Right Of Review

The traditional view of Texas courts that there is a right to judicial review of acts of legislative and administrative bodies affecting constitutional or property rights was again stated in City of Houston v. Blackbird.

B. Method Of Review: Statutory Appeals

Scott v. Board of Adjustment placed Texas in accord with a number of other state jurisdictions by holding that a taxpayer can appeal the decision of a zoning board of adjustment where a statute gives such a right. It is not necessary for the taxpayer to make a showing of special or particular damage as a result of the board's action. The case, which was reversed and remanded for trial on the merits, involved a grant of a variance from the requirements of the zoning ordinance of the city of Corpus Christi to permit the operator of a Ramada Inn to maintain a sign substantially larger than the size allowed by the ordinance for signs of this type. Three taxpayers sought an injunction against the city—one owned property within the zoned district but made no showing of special damage, and the other two taxpayers owned residences several miles away. The common contention made was that the bay front would be damaged scenically.

The court overruled the holding of the court of civil appeals that no justiciable interest provoking a case or controversy was presented by the taxpayers. The court stated that the legislature has the power within limits to authorize the taxpayers to sue in behalf of the public at large. Apart

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53 392 S.W.2d 150 (Tex. 1965).
54 194 S.W.2d 159 (Tex. 1945). See also Board of Ins. Comm'r's v. Title Ins. Ass'n, 272 S.W.2d 95 (Tex. 1954) (judicial review accorded to an order of the Board of Insurance Commissioners approving an agency contract between a title insurance company and an abstract company, though no statutory provision for review existed).
55 405 S.W.2d 55 (Tex. 1966).
56 For a discussion of the extent to which state courts have allowed standing, without regard to statute, to citizens and taxpayers and others alleging adverse impact of governmental action, see DAVIS, ADMINISTRATIVE LAW §§ 22.09, 22.10, 22.11, 22.18 (1958); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION chs. 12, 13 (1965); 2 COOPER, STATE ADMINISTRATIVE LAW ch. 16 (1965).
from statutes expressly giving standing, Texas has permitted taxpayers' suits in the past in relation to misuse of public funds and expenditure of tax monies. Neither criteria was involved in the present case. Professor Cooper, in his recent work, State Administrative Law, after noting the broader recognition of taxpayers' standing to sue elsewhere, adds: "However, notwithstanding the general liberality in recognizing the standing of taxpayers to challenge the validity of administrative action, still if the court feels that a particular action smacks of officious intermeddling by an individual who is in no genuine sense aggrieved, and who expresses concern as a taxpayer merely to gain a forum to debate a political question, he may be denied standing."

Standing to sue and right to statutory appeal were also involved in City of San Antonio v. Texas Water Comm'n where the Guadalupe Authority contended that the city of San Antonio had no standing to appeal an order of the Water Commission granting a permit to the Authority. The supreme court overruled the contention on the basis of a statutory provision which gave the right to "any person affected by any . . . order . . . of the Board" to petition for review to set aside, modify or suspend the order. The court held that the city and the Authority had presented conflicting applications for the same purpose—water appropriation. Their applications were consolidated for public hearing because the same considerations largely applied to each and a statutory balancing of benefits and detriments in approving one application and denying the other resulted in a determination of the same issues. These factors, the court concluded, constituted the city a person affected by the administrative tribunal's order within the statutory contemplation of judicial review and hence a "party aggrieved" by the district court's judgment upholding the order. This afforded the city the statutory right of appeal to the court of civil appeals and of review by appeal or writ of error to the supreme court.

C. Timing Application To Court

Exhausting Administrative Remedies. In House of Tobacco, Inc. v. Calvert the state contended that the petitioner should have exhausted his administrative remedies by requesting the state comptroller to give him a hearing before applying for a temporary injunction against cancellation of his cigarette permit. This contention was rejected by the supreme court because there was no provision for hearing in the statute or in the rules of the comptroller. The statute was held constitutional, even though it failed to provide for a hearing, because the court assumed that the legislature in-

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63 Cooper, op. cit. supra note 60, at 557.
66 394 S.W.2d 614 (Tex. 1965).
tended to enact a valid law and further intended that the administrative board would proceed in accordance with constitutional requirements. This position was consistent with distinctions the supreme court has drawn in the past. The result was that the supreme court issued a temporary injunction because no notice had been given and no hearing was held by the comptroller; thus, cancellation of the permit was prevented. The supreme court refused to allow the interpretation of the trial court that a judicial hearing upon a petition for an injunction may substitute for an administrative hearing antecedent to permit cancellation.

Finality of Administrative Order. A court of civil appeals was faced with the issue of whether a transfer of a motor carrier certificate was properly handled by the Railroad Commission. The protestants had previously complained to the Commission that the certificate should be revoked, and the Commission had overruled their complaint without affording a hearing. The court first said that under the applicable statutes the revocation power was a matter for discretionary exercise by the Commission. However, the court then seemingly went further. It referred to the rules of the Commission which reserve "sole discretion" to determine whether a complaint is "sufficient." It then said: "Additionally, even if the Commission had called the hearing and had found that there was a partial or total discontinuance of operations, appellees would not thereby have acquired any kind of right to require the Commission to revoke the certificates, and the Commission would have breached no duty had it failed to do so."

If the court is merely elaborating the view that revocation need not follow automatically upon filing of a complaint or even upon proving up a complaint, this may well be so, since the Commission is the expert body given discretion to determine the circumstances under which revocation shall be ordered. But the language employed by the court is broad and may be construed as ruling that the Commission's action in this regard is administratively final; that its discretion is absolute because of the permissive "may" contained in the statute. The court may not have intended to assume so strong a position. But it would appear that once the Commission adopts rules providing for receipt of complaints and procedures with respect thereto, even if discretion is retained, judicial review should lie upon a sufficient showing of abuse of this discretion.

67 Industrial Acc. Bd. v. O'Dowd, 303 S.W.2d 763 (Tex. 1957). So long as the statute does not prohibit notice and hearing and notice and hearing are given, a due process question does not arise.
69 Id. at 877.
70 Id. at 878.
71 See Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939) (negative character of an order does not prevent it from being a final reviewable order); see also Mutual Aid v. Williams, 407 S.W.2d 171 (Tenn. 1966).
Affirming a court of civil appeals\(^7\) decision, the supreme court recently held in *Employers Re-Insurance Corp. v. Holt*\(^7\) that a letter written by the Industrial Accident Board declining to take jurisdiction of a workmen's compensation claim was a final order and appealable. The court made it clear that whether the administrative action is ripe for review depends on whether the Board, by its action, reserves something for future decision, thus making its order preliminary and not final. Two court of civil appeals cases\(^7\) were expressly disapproved. The Board's decision is final for purposes of appeal when the Board has finally acted, either by declining to take jurisdiction or by action on the merits of the claim.\(^7\) The court's opinion ended with the admonition: "The finality of Board orders would be clearer and more manifest in such cases as this one if the orders would state: 'The claim is not compensable within the provisions of the Workmen's Compensation Act and is denied.'"\(^7\)

**D. The Record On Review**

In accordance with Texas precedent which has applied the "substantial evidence rule,"\(^7\) a court of civil appeals case recently held that it was not error for the court, while hearing an appeal from a denial of a license, to refuse to consider an administrative hearing transcript, since the transcript contained matter not admissible under the rules of evidence. However, the supreme court held that this precedent is not a barrier where there is a statutory proviso for judicial review, in this case the new Savings and Loan Act, based solely upon the record made before the agency and which requires that the record be certified to the court.\(^7\) The supreme court (1) declared de novo review, compulsions of the new statute unconstitutional, (2) found them severable from other judicial review provisions, and (3) interpreted the language "... but no evidence shall be admissible which was not adduced at the hearing on the matter before the Commissioner or officially noticed in the record of such hearing..." as requiring a somewhat novel application of the substantial evidence test in Texas—substantial evidence represented by the record made before the administrative body and not the court.

**E. Taking Additional Evidence**

The rule of "administrative finality" was applied by the court of civil

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\(^7\) 393 S.W.2d 329 (1966).
\(^7\) Accord, Cooper, op. cit. supra note 60, at 189-93.
\(^7\) Note 71 supra, at 142.
\(^7\) See note 4 supra.
\(^7\) Richardson v. Thompson, 390 S.W.2d 830 (Tex. Civ. App. 1965) error ref. i.r.e.
appeals in Dieter v. Houston Fire & Cas. Ins. Co.\textsuperscript{80} In this workmen’s compensation case the company sought to offer testimony on appeal that the claimant had undergone surgery after the industrial accident award was made, and that the probable effect thereof required a modification of the administrative finding of total disability. The trial court permitted the testimony, and was reversed on appeal since the insurer had not presented to the Board at the time of hearing a demand that a surgical operation be performed in order to effect a cure or materially and beneficially improve claimant’s condition, as the statute provided.\textsuperscript{81} The case which seemed strict—considerations of administrative finality which would prevent the introduction in evidence of supervening facts on occasion have yielded to the court’s view that material facts which are newly discovered be considered either by the reviewing court or by the agency if the court has the power to remand—predictably was overruled by the supreme court.\textsuperscript{82}

F. Scope Of Review

\textit{Excess of Statutory Authority}. The state sued a delivery service for penalties and to secure an injunction against the company’s further operation of a motor carrier without a certificate. The defense was that the Texas Railroad Commission had no jurisdiction over motor carriers which operated exclusively within the incorporated limits of cities or towns due to a statutory exemption.\textsuperscript{83} The defendant operated solely within a number of contiguous incorporated cities. In \textit{State v. Ace Delivery Serv., Inc.}\textsuperscript{84} the supreme court reversed the judgments of the lower courts and held that the Railroad Commission had jurisdiction. The court said that a liberal construction must be given the statute in order that the intention of the legislature to provide for more stringent regulation of the motor carrier industry might be carried out. The court added that it anticipated no difficulties arising between city control of streets and the Railroad Commission regulation of the carriers. In effect, the court has construed legislative language in the context of a presumed legislative intent, reaching a desirable result on a subject of growing state and local concern.

In \textit{Bloom v. Texas State Bd. of Pharmacy},\textsuperscript{85} the Pharmacy Board, after notice and hearing, found a registered pharmacist guilty of substituting a drug other than the drug prescribed without the consent of the prescriber


\textsuperscript{82} 409 S.W.2d at 838. See also Enterprise Co. v. FCC, 231 F.2d 708 (D.C. Cir. 1955) (death of a substantial figure in an applicant corporation after the agency’s final decision caused remand for further agency determination of the applicant’s comparative qualifications).


\textsuperscript{84} 388 S.W.2d 930 (Tex. 1965).

\textsuperscript{85} 382 S.W.2d 496 (Tex. Civ. App. 1964).
in violation of statute. The pharmacist had no knowledge of the substitution and was not negligent. His pharmacist's license was suspended for three years, all but sixty days of this period being made a probationary period. On appeal, the substantial evidence rule was applied and the Board was enjoined from carrying out its suspension order for lack of evidence of scienter.

The supreme court held that when the legislature banned the "substitution" of a drug it meant to restrict this "substitution" to "conscious substitution." The court distinguished certain federal and state cases involving misrepresentation, negligence, foodstuffs or stronger legislative public safety considerations. Three justices dissented, expressing the view that judicial legislation had been written by the majority opinion, and that the pharmacist is in better position to know the content of mislabeled drug containers than the consumer.

In State v. Harrington, the state instituted a civil suit for penalties charging that the defendants had drilled deviated wells in violation of laws and rules administered by the Railroad Commission. The supreme court held that the state need not show, as a condition to recovery of the penalties, "knowledge" or "intent" on the part of the defendants since the statute in question had previously contained a provision for wilful or knowing violation of its terms, and this restrictive language had been eliminated in 1935. On this ground of demonstrated legislative intent not to require the state to show scienter, the court distinguished Bloom.

In a recent civil appeals case, the plaintiffs, operators and owners of Texas State Optical, Lee Optical and other firms, challenged the power of the Board of Examiners in Optometry to adopt a rule particularly forbidding the use of assumed names in the practice of optometry. The trial court found that the Board did have the power to make the rule. The court of civil appeals reversed, reasoning that the failure of the legislature to include use of assumed names in the statute setting out grounds for revocation

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88 The Federal Administrative Procedure Act defines a "sanction" to include either a penalty or fine or a suspension. 5 U.S.C. § 1001 (1964). In the present case a suspension was involved. In the recent case of FTC v. Henry Brock & Co., 368 U.S. 360 (1962), the United States Supreme Court intimated strongly that it would require the Federal Trade Commission to draft its cease and desist orders with more definiteness when the penalty for violation became more harsh under an amendment to the statute. There is perhaps no more than variation in degree between the approach taken by the Supreme Court of the United States and the interpretation of the Texas Supreme Court in Bloom, when we realize that a penalty in the form of a fine, no matter how drastic its terms, may affect the party less than a lengthy suspension of license to pursue the livelihood toward which years of education and training have been given.
89 407 S.W.2d 467 (Tex. 1966).
tion of a license, in effect, expressed a legislative intention to exclude such action as a ground for revocation under the canon expressio unius est exclusio alterius. Legislative intention to withhold power to prohibit assumed names was shown by the fact that in 1953 the legislature rejected by decisive votes in both Houses an amendment which would have limited the practice of optometry under an assumed name. In the light of this legislative intent, the court found that the Board did not have the power to make the challenged rule. The court distinguished Kee v. Baber, on the ground that optometry rules there sustained implemented but did not add to the statute. In Baber, however, the supreme court found the rulemaking power conferred on the Board to be very broad since the optometry rulemaking power expressly extends to rules necessary for "the regulation of the practice of optometry." Since the same statute was before the supreme court in Baber and the court of civil appeals in this case, it is difficult to reconcile the supreme court's view that the Optometry Board had a broad power to make rules with the court of civil appeals' application of expressio unius in the present case. The Baber case seems distinguishable since the rules involved in that proceeding, e.g., the "bait advertising" rules, were more reasonably related to the Board's express statutory jurisdiction over acts of deceit or misrepresentation and were regulatory rather than prohibitory (as in the case with the assumed name rule). Moreover, in the present case there is evidence of legislative intent to withhold the asserted power. However, it may be that the second ground assigned by the court of civil appeals in support of its conclusion, that there was a demonstrated rejection of a grant of power to the Board to regulate in the area of assumed names, may serve to distinguish the cases. Legislative history of this kind, however logical the above construction may seem, often becomes the subject of conflicting inferences. For example, courts may reason that the amendment rejected was administratively desirable only for clarification of existing statutory authority, or that it was rejected because the existing authority comprehended the subject, or that administrative practice over an adequate period of time had involved exercise of the power, and this practice was known to and acquiesced in by the legislature. The case does not indicate the presence of such possibilities. Since this article was prepared the supreme court has reversed the court of appeals. As the reversal does not affect the administrative law point involved, namely that the court independently reviews the question of statutory interpretation involved in a regulation adopted by an administrative agency, the supreme court decision will not be discussed.

93 303 S.W.2d 376 (Tex. 1957) (upholding Board's rule regulating "bait advertising," and two other rules).
Abuse of Discretion. In City of Houston v. Blackbird the supreme court found that the judicial review provisions of the Street Improvement Statute does not permit de novo judicial review of special paving assessments made by cities against properties abutting the improvements. Review therefore was limited to arbitrary action or fraud on the part of the assessing body. The court found that the city's determination of the benefits accruing to the plaintiff's property because of the proposed improvements was an arbitrary determination and thus an abuse of discretion.

Unsupported by Substantial Evidence. A common question faced by Texas courts reviewing action taken by administrative agencies under statute is how far they can extend their powers of judicial review without violating the separation of powers provision. But the question of how limited judicial review of administrative action is intended to be is an infrequent one. The new Savings and Loan Act presented the problem directly in Gerst v. Nixon. Although the new judicial review provisions inserted in the statute in 1963 provided in a general way for trial de novo and a redetermination of fact issues “on the preponderance of the competent evidence,” they also provided that “no evidence shall be admissible which has not adduced at the hearing on the matter before the Commissioner or officially noticed in the record.” The court held that the legislature had the prerogative to specify the kind and nature of review “so long as constitutional safeguards and requirements are not transgressed.”

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96 394 S.W.2d 159 (Tex. 1965). For further discussion see Webster and FitzGerald, Municipal Corporations, this Survey at footnote 61.
98 The issue was whether or not trial de novo was proper. The statute, note 97 supra, contained the customary provision that the governing body of the city shall assess abutting owners only after a hearing. Owners are entitled to challenge the amounts of the proposed assessments and the special benefits to the abutting owners; and it was further provided that the governing body should “determine the amounts of assessments and all other matters necessary at the hearing.” (Emphasis supplied.) The same statutory provision contained judicial review provisions, less specifically describing de novo trial characteristics than many Texas statutes do, yet providing for “institution of a suit.” It provided that a challenge of the amount of assessment could be contested on appeal and that contest could be had with respect to “any matter or thing not in the discretion of the governing body.” (Emphasis supplied.) The legislature must have intended, according to the supreme court, that a finding of special benefit to abutting property and a determination of the amount thereof should be entrusted to the governing body of a city, for otherwise these matters would have been made expressly subject to contest on appeal, and would not have been precluded from review as matters within the “discretion” of the city and subject to its “determination.” Trial de novo on these matters was therefore held improper as a matter of statutory construction. The question to be decided on review, then, is limited to whether the evidence in the record establishes that the action of the city in making the benefits determination was arbitrary.
99 Professor Davis has entitled the subject “The Constitutional Maximum of Review,” Davis, op. cit. supra note 60, § 29.10.
100 TEX. REV. CIV. STAT. ANN. art. 852a (1964).
102 TEX. REV. CIV. STAT. ANN. art. 852a, § 11.12 (5) (b) (1964).
Thus, if the legislative branch guards against arbitrary administrative action in its provisions for judicial review, it may do so in language restricting the court to a review of the administrative record though that record may include incompetent matter. The presence in the record of incompetent material “is a matter for the consideration of the trial judge in determining the issue of ‘substantial evidence’.” The court supported its conclusions by especially noting the directives in the statute for the formulation of a formal record, and the filing of the record with the court on review. The supreme court also (1) voided the de novo review provisions as unconstitutional in view of the broad administrative standards represented in the statutory terms “public need” and “undue harm to existing associations,” (2) approved the definition of “public need” given in a recent court of appeals decision; (3) construed the statute to require application of the substantial evidence rule and defined substantial evidence as such evidence as would justify administrative action as not being “arbitrary”; and (4) affirmed the judgments of the courts below finding the Commissioner’s order not supported by substantial evidence.

In a court of civil appeals case the State Water Pollution Control Board granted a permit to a public district to discharge sewage effluent from a sewage treatment plant into a usually dry stream in the vicinity of the plaintiff’s property. The plaintiff appealed under the statute which provides in clear and specific terms for complete de novo review, i.e., the preponderance of the evidence and not the substantial evidence rule was to be applied. It was held nonetheless that review should be under the substantial evidence rule because the license granting powers of the administrative tribunal were involved, and therefore the action was legislative in nature. It may be added that the various duties and standards in the statute were somewhat broad including the following statutory language: “This shall not be construed to prohibit the Board from taking any means

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104 Id. at 133.
105 Id. at 130.
106 In Chimney Rock Nat’l Bank v. State Banking Bd., 376 S.W.2d 595 (Tex. Civ. App. 1964) a definition of the term “public necessity” under the Texas banking statute, Tex. Rev. Civ. Stat. Ann. art. 342-10 (1959), was given for the first time. The court of civil appeals said that “public necessity” does not mean an “absolute need” or “economic need,” or that existing banks are not meeting the present banking necessities, on the one hand, or “mere inconvenience” on the other; but convenience supplemented by circumstances persuasive of necessity such as rapid population growth and substantial growth of all banks in the area may be sufficient.

108 Corder v. State Water Pollution Control Bd., 391 S.W.2d 83 (Tex. Civ. App. 1965) error ref. n.r.e.
110 Kost v. Texas Real Estate Comm’n, 379 S.W.2d 306 (Tex. Civ. App. 1962) error ref. (denied de novo judicial review of the issuance of a real estate salesman’s license under a statute calling for broad exercise of discretion under rules to be promulgated by the Commission).
by this Act to prevent the discharge of waste which is injurious to public health."

The court of civil appeals applied the substantial evidence rule and reversed the administrative tribunal in a case requiring no greater expertise on the part of the state board than on the part of the reviewing court. A liquor permit was administratively suspended because beer had been sold to a minor, and appeal followed. The issue was whether it had been sold "knowingly," a condition to suspension expressed in the statute. The facts showed that the proprietor of the liquor store knew that an investigator for the Liquor Control Board was seated in a car across the street at the time of the sale, and that the store had suffered a three-day suspension several months before. Under these circumstances the court reversed the Board on the basis that "reasonable minds" could not believe that the proprietor had "knowingly" sold beer to a minor.

In another court of civil appeals case the State Banking Board granted an application for a bank charter. After surveying the evidence introduced in the district court in a non-jury trial, the court of civil appeals applied the substantial evidence rule, saying: "It is our opinion that under this record the Board could not have entered an order that would have been an abuse of its discretion. There is an abundance of evidence of a substantial nature which would have reasonably supported an order denying a charter to Northline as well as reasonably supporting the order entered. It is in such situations that the expertise of the Board is employed with conclusive effect.

The prima facie weight attaching to orders of administrative agencies subject to the substantial evidence rule was re-emphasized in City of San Antonio v. Texas Water Comm'n. The court reiterated a test it has applied before, i.e., that those who appeal an agency order, reviewable under the substantial evidence formula, have the burden of showing "that the order denying their application is not reasonably supported by substantial evidence existing at the time of the entry of the order by the Commission."

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112 Id. § 5(h). Compare State Bd. of Ins. v. Professional & Business Men's Ins. Co., 359 S.W.2d 312 (Tex. Civ. App. -1962) error ref. n.r.e. (under a less discretionary statute, more susceptible to objective fact finding, initial licensing administrative action was held subject to de novo court review).
113 Texas Liquor Control Bd. v. Coggins, 402 S.W.2d 935 (Tex. Civ. App. 1966) error ref. n.r.e.
115 Id. at 815.
117 Id. at 71.