Denver Law Review

Volume 32 | Issue 7 Article 7

January 1955

Administrative Law

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ADMINISTRATIVE LAW

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GENERAL STATEMENT

The consistent pattern followed in this field applies well established rules to specific fact situations and emphasizes the importance of proper interpretation of constitutional and statutory language. Having determined upon the proper interpretation, those charged with administrative duties thereunder and those affected thereby must not deviate therefrom with respect to the matters giving rise to the remedy sought or resisted nor with respect to the method of pursuit of or defense against such remedy.

The cases will be discussed with relationship to the principles announced rather than in chronological order.

I.

An administrative agency must act within the scope of the authority conferred by the power creating it. Two cases fall within this rule.

In *Union Pacific Railroad Company et al. v. Oil and Gas Conservation Commission et al.*,[1] the parties other than the Commission operated all except five of the wells producing both oil and gas in the Rangely Field. The legislature had invested the Commission with authority to enforce a statute forbidding waste of oil or gas, the production of gas in an excessive or unreasonable amount from wells producing both oil and gas, and the production of oil or gas in such quantities or in such manner as would unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced. The Commission was vested with authority to make and enforce such rules and regulations as might be reasonably necessary to carry out the provisions of the act. Pursuant thereto, it made a regulation requiring all gas not needed for lease operations or used locally for domestic or municipal needs to be returned to the reservoir. Plaintiffs sought to enjoin the enforcement of this regulation. The court held that the authority delegated to the Commission to prevent the production of gas in an excessive or unreasonable amount or in such manner as would not unreasonably reduce reservoir pressure did not embrace the authority to make a regulation requiring excess gas to be returned to the reservoir. The court recognized the advantages which might accrue from such a regulation, but nevertheless enjoining its enforcement applying the well-established principle that "the Commission may act only within the authority delegated by the legislature under standards clearly fixed by the law, leaving no discretion in the Commission to declare what the law is."

As a result of this decision, the 1956 legislature will probably

[1] 284 P. 2d 242.

be given the opportunity to grant or to refuse to grant to the Commission the power to make such a regulation.

Cloverleaf Kennel Club v. Racing Commission,[2] was another case where a commission was held to have exceeded the power delegated to it by the legislature. The racing act provided that this Commission should license, regulate and supervise races and pari mutuel wagering at which animals participated, should visit and inspect such places at least once a year, and should require such places to be constructed, maintained and operated in accordance with the laws of the state and the regulations of the Commission. The act provided certain limitations relative to the issuance of licenses, the number of certain types of meets to be held in any one county each year, the duration thereof, the distance of competitive tracks from each other, and that no race meets should be conducted on Sunday. The statute also enumerated the eligibility requirements and factors which would make applicants ineligible. None of the restrictions rendered the plaintiff nor the locality ineligible. The Commission denied the plaintiff's application for a license on the ground that there were already three tracks, including one forty-five miles distant from the proposed site, and because 180 days of racing had been permitted on the Eastern Slope and the Commission felt the grant of the license would not be in the best interest of racing nor of the state. The Supreme Court held that the license should have been issued; that the Commission assumed powers and exercised discretion beyond the limitations described in the act; that the statute did not vest in the Commission the authority to declare public policy, public policy having been established by the vote of the people implemented by an act of the legislature. It was not for the Commission to say what may or may not be the need of certain localities nor what is in the best interest of racing. While recognizing the duty to give full respect to the findings of the Commission, such respect is to be accorded only if the discretion is exercised on matters which the administrative agency could lawfully consider. The power, granted by the statute to prepare and promulgate a complete set of rules and regulations to govern the race meets in the state and to determine and announce the place, time and duration thereof, is not a sufficient grant of discretion so as to permit a limitation of the number of licenses for reasons other than those specified in the statute. This construction is fortified by the provision that the Commission is commanded to renew an application if no violation has been committed by the operator, indicating the legislative policy of withholding authority from this Commission in contrast to the broad authority granted to the licensing authorities by the liquor code and the boxing and wrestling act in each of which discretion was given to the respective adminstrative agency to limit the number of licenses. The fact that the legislature could easily have given such power in the

[2] 277 P. 2d 226.

manner followed by previous legislatures indicates that the legislature did not intend to give this Commission such broad powers. The Commission's statement that the refusal was in the best interest of racing violates elementary principles of constitutional law to the effect that the propriety, necessity and expedience of legislation is for legislative determination only. The court was unwilling to ascertain public policy from any source other than the constitution and statutes. The Commission by its denial of a license attempted to exercise a power which it did not possess.

Justice Alter concurred in the result. Justice Moore in behalf of himself, Chief Justice Stone and Justice Clark dissented on the ground that racing is not inherently lawful but on the contrary had been historically and inherently a gambling enterprise legalized only by virtues of the statute. The regulation of this activity involve public morals and general welfare and thus warranted an exercise of police power in the public interest. No applicant has an inherent right to engage in the business of racing and wagering thereon. A license so to do is a privilege to be granted or withheld in the Commission's discretion. The statute granted authority to license, determine the kind, time and place of racing meets and consider the location of tracks; the statute limited the power only in certain specific instances. The intent was to tell the Commission when it cannot license, thus granting discretion in the field outside the prohibited area. The Commission did not act arbitrarily, capriciously or unreasonably, and its ruling should not be set aside in situations where reasonable minds might reach opposite conclusions. The court should not substitute its own judgment for that of the administrative body.

II.

Although the action taken by an administrative agency is within the scope of the power conferred, nevertheless in exercising discretion in carrying out its functions, it must adhere to the standards prescribed by the authority creating it.

In *Civil Service Commission v. Frazzini*,[3] the plaintiff asserted that the method employed by the Civil Service Commission in conducting an examination for assistant fire chief and deputy fire chief was improper, and, therefore, the appointment of the successful applicant was improper. Under the procedure followed, the oral examination was given a weight of 60, and merit and seniority were each given a weight of 20. On the oral test and individual interview test, there were eight factors considered upon which each examiner gave each applicant a rating from A to E, inclusive. The Denver charter required a competitive examination. The court held with plaintiff in his contention that this method precluded a competitive examination because it made objective grading impossible and, accordingly, the grades given were depen-

[3] 287 P. 2d 433.

dent entirely upon the impression made upon the individual interviewer rather than upon fixed standards which could accurately and objectively determine the result. "By the very nature of a subjective examination of this character, the likelihood of abuse, favoritism and human error are inherent, and greatest care and caution should be exercised by the Commission to avoid the possibility of these results . . . If personality factors are embraced within the examination, the announcement should specifically so state." In brief, the examination did not produce an objective test; it was therefore not competitive. The Commission thereby disregarded the standard prescribed. The court further held that under the facts of this case, there was no estoppel because the candidate certified by the Commission will be returned to his former position and, therefore, sustained no damage by reason of the irregularities.

III.

If the administrative agency succeeds in avoiding the above pitfalls, has jurisdiction, regularly pursues its authority and does not abuse its discretion, the courts will not review the merits of its determination.

In *Glenn v. Colorado State Board of Medical Examiners*,[4] the court comments that "the record in this case discloses a conglomerate mixture of procedural monstrosities." To avoid embarrassment, the court exonerated plaintiff's present counsel because such counsel occupied "third place on the list of attorneys who have represented him during the course of this litigation." The court recognized the difficulties under which counsel operated and offered some slight encouragement by stating that they might have done better had they represented the plaintiff throughout the proceedings.

The plaintiff who had been licensed to practice medicine was charged with having uttered false narcotic prescriptions, being himself addicted to narcotic drugs for which he wrote prescriptions for himself and others, all of which action allegedly constituted grossly unprofessional and immoral conduct. The claim was that the Commission in revoking his license to practice after a hearing had made its determination upon insufficient evidence and as a result of passion and prejudice.

In sustaining the Commission, the court stated that it had many times announced that it was restricted on a review to a consideration of "whether the Board had jurisdiction; abused its discretion; or regularly pursued its authority." It considered the facts only to the extent of determining whether the Board wrongfully exercised its authority without proper or judicious discretion,

[4] 284 P. 2d 230.

and having determined that it did not so act, held that the merits of the case were not involved.

With respect to the charge of passion and prejudice, the court stated:

> The record clearly shows that said Board treated plaintiff with every courtesy and give him every opportunity and any other finding would have been but a whitewash and the exercise of an unjustified leniency to the detriment of the public welfare.

IV.

The sovereign and the citizen must properly pursue the remedy in the manner and form prescribed by the authority creating the remedy. The case of the aggrieved citizen will be first considered.

In *Heron v. City and County of Denver*,[5] the court held that, if an administrative agency makes a mistake, the way to correct it is to exhaust the administrative remedy before commencing a civil action. The Denver building code provided that only a licensed architect may submit plans and specifications for public or semi-public buildings. The plaintiff being an engineer but not a Colorado architect submitted plans and specifications, but a building permit was denied. The building code provided that a person thus aggrieved should seek relief within a specified time from the Board of Appeals created by the code. The plaintiff by-passed this procedure by the island-hopping tactics of commencing an action in the District Court, defending his position by the contention that the issuance of the building permit was a ministerial act and not one which required the intermediate step of applying to the Board of Appeals. The court, however, remained unconvinced, stating:

> Unless the administrative remedies are exhausted, it never can be known what correction would ensue if the authority is given full opportunity to pass upon the matter. Our court has adhered rather strictly to the requirement of the exhaustion of administrative remedies before the court will take jurisdiction.

The above rule is applicable where an arm of the state considers that the sovereign has been aggrieved.

In *People ex rel Kimball, Director of Game and Fish Department v. Crystal River Corporation*,[6] it appeared that a bear had caused the death of forty-four sheep. The owner of the sheep, pursuant to the statute which gave him a right of action against the sovereign, made claim, pursuant to which arbitrators were appointed as the statute directed. The Game and Fish Department submitted evidence and named one of the arbitrators. The award

[5] 283 P. 2d 647.
[6] 280 P. 2d 429.

was made and certified in favor of the claimant but was attacked by the Commission. The court held that the sovereign having consented to this method of determining the liability is bound by the action of the proper administrative agency; and the arbitrators having jurisdiction, a writ of certiorari would not issue as a matter of right, but only on good cause shown which would justify an inference of fraud or abuse of discretion on the part of the arbitrators. Neither the individual nor the agency of the state may participate in the selection of the arbitrators, attend the hearings, submit evidence and, in the event of an adverse finding, seek a review merely because the award is unfavorable.

V.

A statute of limitation does not bar a proceeding to recover from the estate of a decedent funds of the sovereign paid by an administrative agency to the decedent which the decedent was not entitled to receive.

In *State of Colorado v. Estate of Griffith*,[7] the decedent had been an old age pension recipient. After her death, it appeared that the extent of her property holdings rendered her ineligible to have received any pension. Within the six months, Jefferson County Welfare Department filed a claim to recover a portion of the amount paid; after the six months it amended its claim to recover the entire amount paid. The state filed its claim for the same entire amount as a matter of security against the contingency that the Welfare Department's claim might be disallowed. The court held that time does not run against the sovereign. This principle can more forcibly be applied in the case of fraud than in other cases. The claim of Jefferson County Department of Public Welfare as an arm of the state should have been allowed.

VI.

The recent inauguration of a strict construction of tax exemptions will be adhered to.

In *Grace Calvary Church v. City and County of Denver*,[8] the church had purchased land at a tax sale for the purpose of erecting a building, but it was denied a building permit because it was on the route of the proposed Valley Highway. The action was to recover taxes previously paid on the ground that the property was exempt.

The statute exempts from taxation "lots with the buildings thereon, if said buildings are used exclusively for religious worship." In former decisions, the court had held that where it was contemplated that structures were to be used and steps were to be taken to indicate such intention, the exemption would apply. In one such decision, an excavation had been dug and a foundation

[7] 275 P. 2d 945.
[8] 274 P. 2d 983.

commenced, and in another case an existing building had been demolished with the intention of erecting a new building in its place. However, this liberality had been discarded by the court in the case of *City and County of Denver v. George Washington Lodge Association,*[9] wherein Justice Stone stated:

> It is not surprising in view of the former decisions of this court that the trial court so held (in favor of the exemption.) However, a departure is not less a departure because it is made step by step, and it appears high time for this court to determine not merely how far we have departed from the last departure, but whether we have departed from requirements of the statute itself.

In the case before the court, the application for a building permit followed by its denial was not even the vestige of a structure, and in the absence of the structure, the requirement of the statute was not met, and the exemption necessarily failed.

CONCLUSION

The above decisions indicate that administrative agencies and persons dealing with them or affected by their actions can anticipate strict construction with respect particularly to the limitations of authority, the abuse of discretion, exhausting the administrative remedy, the finality of determinations by such agencies acting properly within their authority, and a strict construction likewise of any privilege of exemption or statutory limitation which would impair the public revenue. The broad inference is that powers conferred and privileges granted must be clearly contained in legislative language and that failure to observe procedural requirements invites disaster.

Notes From The Secretary

The final report of the Economic Survey and Minimum Fees Committee of The Colorado Bar Association is now being readied for publication. At the present time our thought is that it will be a part of the Annual Report, which will be mailed to the members in late January or early February. The report is very extensive and includes summaries and tables on both the Economic Survey Questionnaires and the Minimum Fee Questionnaires. We are sure that all of you will look forward to this report with great interest.

The Grievance Committee of The Denver Bar Association has had numerous complaints filed with it during the past few months. Most of these complaints referred to the method of charging fees

[9] 121 Colo. 470, 217 P. 2d 617.