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THE POWER OF THE DENVER WATER BOARD TO ENACT PENALTY REGULATIONS

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Due to an unusually small amount of precipitation in Colorado during the past year, and having in mind the conservation of water resources available for use in Denver, the Board of Water Commissioners, pursuant to the Charter of the City and County of Denver, promulgated a regulation to the effect that the residents of Denver may use water for irrigating purposes only during certain hours on certain days of the week. The regulation further provides that, "use of water contrary to the rules and regulations of the Board" will subject the occupant of the premises to a warning for the first violation, a five dollar "special charge" for the second, $25 for the third, and, "If further misuse occurs, similar procedures shall be followed but thereafter the special charge shall be one hundred dollars ($100) on each occasion of misuse." [1] While that part of the regulation which limits the hours of irrigation seems to be within the authority granted to the Water Board by the Charter, it is submitted that the Board is without authority to penalize for the violation of its regulations.

AUTHORITY GRANTED THE WATER BOARD BY THE CHARTER

Article XX of the Colorado Constitution vests the legislative power, in matters of local concern, in the people of Denver.[2] The people of Denver in turn, have vested the legislative power, with reservation, in the City Council.[3] By amendment to the Charter in 1918, the people of Denver created the Board of Water Commissioners and granted it certain specific authority. [4] It is necessary to examine that grant in detail:

> The board shall have and exercise all powers given to the public utilities commission of the city and county of Denver and its successors by article XIX of the charter, as amended to May 17, 1916, and as amended by section 264C adopted May 15, 1917, and not inconsistent with the provisions of this amendment.

This portion has the effect of withdrawing whatever power was granted to the Public Utilities Commission and vesting it in the new Water Board. Turning to Article XIX of the Charter to determine the scope of the authority previously given to the Public Utilities Commission, we find:

> Said commission shall . . . fix and collect all rates and charges for any service under its control, which

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[1] Denver Post, June 25, 1954, p. 1.

[2] Colo. Const. Art. XX, § 5 and 6; Speer v. People, 52 Colo. 325.

[3] Denver Charter Art. XIV, § 18 (Speer Amendment—May 17, 1916).

[4] Charter Art. XIX § 297B.

> rates and charges shall be made as low as good service will permit. Said commission may adopt reasonable rules and regulations with reference to such service . . . Said commission shall have and exercise all the powers of the city and county granted in the constitution or named in the charter in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant or system for all uses and purposes and everything pertaining or deemed necessary or incidental thereto.

Again we are referred back—this time to Article XX of the Constitution. What powers did Article XX give to the City and County of Denver "in the matter of constructing, purchasing" etc. a water system? Quoting from Section 1 of Article XX:

> . . . said corporation . . . shall have the power, within or without its territorial limits, to construct, condemn and purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof . . . and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

Thus, the authority previously granted to the Public Utilities Commission and by amendment transferred to the Water Board is the authority to fix rates, make reasonable rules and regulations, and the constitutional authority to conduct and operate a water system.

The next grant of authority to the Water Board is a restatement of the constitutional and Charter (Article XIX) authority given to acquire, conduct, operate, etc. a water works system and everything incidental thereto:

> The board shall have and exercise all the powers of the city and county granted by the constitution and laws of the state of Colorado and by the charter, in the matter of purchasing, condemning and purchasing, acquiring, constructing, leasing, extending and adding to, maintaining, conducting and operating a water works system and plant for all uses and purposes, and everything necessary, pertaining or incidental thereto.

It is under this provision of the Charter that the Water Board believes it has the power to penalize.[5]

[5] Conference with Mr. Glenn G. Saunders, Counsel for the Water Board, August 4, 1954.

Next comes the Charter authority to fix rates and provide rules and regulations, with specific authority to penalize for non-payment or late payment of bills:

> . . . It shall fix the rates for which water shall be furnished for all purposes, and shall provide rules and regulations relative to the use and distribution thereof. All water rates shall be uniform as far as practicable, and as low as good service will permit, and after the bonded indebtedness is paid shall be no more than necessary to cover the cost of operation, maintenance, additions, extensions and betterments. The board shall provide for the payment of water rates in advance, at least twice yearly, and shall provide penalties for failure to pay promptly and for non-payment.

The Water Board is of the opinion that it is on a par with the City Council: that it is given all of the powers of the City and County of Denver which might be used in connection with operating a water system.[6] The Board feels that the legislative powers given to the City Council by the Speer Amendment were withdrawn and vested in the Water Board insofar as they may be exercised in the operation of the water system. It interprets the words "all of the powers of the city and county granted by the constitution and laws of the state of Colorado and by the charter, in the matter of purchasing, . . . conducting and operating a water works system . . . " as all the powers granted to the people of Denver by the Constitution and to the city government through the Charter which the Board might be able to use in operating the water system. The Board evidently overlooks the phrase "in the matter of".

The proper meaning of the grant is, all powers granted to Denver related to or pertaining to or mentioning the operation of a water system. This would include Section 1 of Article XX of the Constitution, whatever state laws permit local control of water, and the authorization given in Article XIX of the Charter to acquire and operate a water system.

If the provision of the Charter giving all powers meant general legislative power, there would be no purpose in the grant of authority to fix rates and make rules and regulations because these would be included in general legislative power. Nor would the provision authorizing the assessment of penalties for non-payment of water bills be of any importance because the power to initiate penalties is a legislative power and would be included in the general grant of legislative power.

The City Council evidently believed that the Water Board was without authority to make penal regulations, *i.e.*, does not have general legislative powers, when it declared that any use of water in violation of the Board's regulations would "be conclu-

[6] *Ibid.*

sively presumed to be wasteful and in violation of this section".[7] Counsel for the Water Board believes that this ordinance is in violation of the Charter since, according to the Board's theory, the City Council has no legislative authority whatsoever in matters concerning the water system.

If the Water Board has all the powers of the city which it might use in conducting its water operations, it must have the power to levy a general property tax for the purpose of building a new pumping plant. The power to tax is given Denver both in Article XX of the Constitution [8] and in the Charter.[9] It is difficult to believe that either the Council which drafted the amendment creating the Board or the people of Denver who voted on the amendment intended that the Board should have the power to tax. It is equally difficult to imagine the Supreme Court upholding a tax levied by the Board.

The extent of the Board's power has never been litigated.[10] The only other penalty regulation made or exercised by the Board concerns a "stolen connection"—the failure of a plumber to report the installation of a plumbing fixture. The penalty has been assessed "two or three times"; once for $300.[11]

It should be noted here that the Board's penalty regulation, concerning misuse of water, terms the penalty a "special charge". The theory of the Board is that since it has no way of knowing how much extra water is being used through the violation, it is justified in its estimates of $5, $25, and $100 as compensation for the extra use.[12] It would be difficult for the Board to persuade a court that a person who was discovered on ten occasions within a year irrigating after hours might conceivably have used $730 worth of water beyond the amount permitted by the regulations.

This is not a special charge; it is a penalty:

> A penalty is a sum of money exacted by way of punishment for doing some act which is prohibited, or omitting to do some thing which is required to be done.[13]

The special charge theory is especially weak when measured by the Charter requirement that, "all water rates shall be uniform as far as practicable and as low as good service will permit".[14]

Mr. Sanders asserted that even if the *special charge* were held to be a penalty, the regulation is valid because the Water Board has the power to penalize.

It is submitted that the Charter does not give the Water Board general legislative power in its operation of the water department: that the Board is an agency of the people of Denver

[7] Munic. Ordinances of Denver, § 850.13.
[8] §6 g.
[9] Art. XIII, § 190.
[10] Conference with Mr. Saunders.
[11] *Ibid.*
[12] *Ibid.*
[13] 31 Words and Phrases 635.
[14] Charter Art. XIX, § 297B.

with specific authority to operate a water system (as a municipal utility)[15] and in doing so, to exercise the quasi-legislative functions of fixing rates and providing rules and regulations. The Water Board is an administrative agency of and directly responsible to the people of Denver.

PENALIZING POWERS OF ADMINISTRATIVE AGENCIES

Ordinarily administrative agencies are created by the legislature. The Board of Water Commissioners was created by the people of Denver in whom the legislative power was vested by the Constitution. Therefore, in the discussion which follows we must think of the people of Denver as occupying the same position as the various legislatures discussed in the cases.

> Administrative authorities may be empowered to enact rules and regulations having the force and effect of law, but any criminal or penal sanction for the violation of such rules and regulations must come from the legislature itself. Administrative authorities may not initiate such sanctions.[16]

In the case of *United States v. Eaton*,[17] the Supreme Court held that the Commissioner of Internal Revenue could not impose a penalty (which it was authorized to impose for violation of a law) for the violation of a regulation which the statute did not specifically give the status of law. The case has been criticized for its possibly too fine distinction as to what the legislature meant to be "law", but its importance here is in that it illustrates the fact that if the legislature does not authorize a penalty for violation of an administrative agency's rules and regulations, the agency cannot exercise legislative power and initiate its own penalty.

Without statutory authorization, a California board of education, pursuant to its regulation, reduced the salary of a teacher until such time as she should acquire additional college credits. The California Supreme Court, in the case of *Rible v. Hughes*,[18] stated that the board was "powerless to impose penalties, a purely legislative power"; and further, that the board was a quasi-municipal corporation with only limited powers which could not be exceeded.[19]

In the case of *Commonwealth v. Diaz*, [20] the Supreme Court of Massachusetts reviewed the penalizing powers of administrative agencies and concluded:

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[15] Englewood v. Denver, 123 Colo. 290.
[16] 42 Am. Jur. 355.
[17] 144 U. S. 677.
[18] 140 P. 2d 181, 184.
[19] This case was later reversed, 150 P. 2d 455; the Court decided that there was no penalty involved, that the board's regulations "merely provide that a teacher is to be compensated in accordance with training and experience."
[20] 326 Mass. 525, 95 N.E. 2d 666, 669.

> . . . Thus it would appear that the practice of authorizing a municipality or board to fix penalties within definite limits is one of long standing in this Commonwealth and we know of no case decided by this court where it has been held to be objectionable . . .
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> . . . The authority which may be granted to a local governing body to fix penalties, even when a maximum limit is prescribed, is not unrestricted. Such bodies cannot be granted a roving commission to establish within broad limits such penalties as they see fit. That is essentially a legislative power which cannot be delegated.

It will be noted that underlying the Court's discussion here is the basic principle that unless authority to penalize is specifically given by the legislature, the agency has no such authority. The problem discussed by the Court was, assuming authority is given, how limited must it be in order to be a constitutional delegation of authority.

The Federal Administrative Procedure Act restates the law pertaining to sanctions.[21] "In the exercise of any power or authority—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

While the Model State Administrative Procedure Act does not contain a section dealing expressly with sanctions, Section 6 (2) reads, "The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency . . . " Thus under the uniform state act, a rule or regulation imposing a penalty would be held invalid where the legislature did not authorize sanctions.

Ways in Which the Legislature May Initiate Sanctions When Creating an Administrative Agency

A common provision for sanctions, in statutes creating administrative agencies, sets out both the law and the penalty for its violation and authorizes the agency to determine when the law has been violated. The statute may authorize the agency to impose the penalty or it may leave that function with the executive and judiciary branches.

One of the many cases illustrating this method is the case of *Lloyd Sabando Societa Anonima Per Azioni v. Elting, Collector of Customs.*[22] The Immigration Act of 1917 and 1924, made it unlawful to transport to the United States certain classes of aliens and empowered the Secretary of Labor to determine the fitness of aliens and collect a $1,000 penalty for violation of the Act. The United States Supreme Court said:

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[21] § 9 (a).
[22] 287 U. S. 329.

> Under the Constitution and laws of the United States, control of admission of aliens is committed exclusively to Congress and, in the exercise of that control it may lawfully impose appropriate obligations, sanction their enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them.

Another instance of this method of penalizing is found in the federal revenue laws:

> Section 293 (b) of the revenue act of 1928 provided, "If any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid . . . " [23]

A second way in which the legislature may initiate a penalty is by setting out the penalty for violation of rules and regulations which the statute authorizes the agency to make. Here again the statute will authorize either the agency or the courts to impose the penalty.

Illustrating this method is the case of *Singer v. United States* [24] which involved the Selective Training and Service Act of 1940. Referring to the *Eaton* case, *supra,* the United States Supreme Court said:

> (The Court) reasoned that since Congress had prescribed penalties for certain acts but not for failure to keep books the omission could not be supplied by regulation . . . The situation here is quite different. Section 11 of the present act makes it a crime to do specified acts, either by way of omission or commission, in violation of the Act or the rules and regulations issued under it.

Another case which illustrates this method is *United States v. Grimaud.*[25] The Supreme Court upheld a statute which authorized the Secretary of Agriculture to:

> . . . make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations . . . ; and he may make such rules and regulations and establish such service as will insure the objects of such reservation . . . ; and any violation of the provisions of this act or such rules and regulations shall be punished (by a) fine of not more than $500 and imprisonment for not more than 12 months or both, at the discretion of the court.

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[23] Helvering v. Mitchell, 303 U. S. 391.
[24] 323 U. S. 338, 345.
[25] 220 U. S. 506, 509.

The rules and regulations must be within the scope of the administrator's authority.[26]

The third method by which the legislature initiates sanctions is by authorizing the agency to provide penalty regulations, within limits, for the violation of the rules and regulations which it is authorized to make. This method has been attacked as an unconstitutional delegation of legislative power.[27] While "the cases exhibit a tendency to invalidate penalty regulations",[28] an important exception to the general rule is the "penalty-declaring power (given) to bodies having a limited geographical jurisdiction. In this class fall municipalities, an appointive local board, and subdelegations to administrators through municipalities. While it is possible that express constitutional authority exists for such delegations, historical grounds plus expediency are their real justification." [29] It will be noted that the Board of Water Commissioners would fall within the above exception. The argument in this paper is not that the people *could not* have given the Water Board the authority to penalize but that they *did not.*

An example of the authority to make penal regulations is the authority given to the Water Board to penalize for violation of its regulations pertaining to payment of water bills.[30]

In the case of *Commonwealth v. Diaz,*[31] the Supreme Court of Massachusetts upheld a statute authorizing the Commissioner of Airport Management to:

> . . . make such rules and regulations, subject to the approval of the board, for the use, operation, and maintenance of state-owned airports as he may from time to time deem reasonable and expedient, which may provide penalties for the violation of said rules and regulations not exceeding five hundred dollars for any one offense.

In another case,[32] the Court of Appeals for the District of Columbia upheld a congressional statute—the District of Columbia Traffic Act—which authorized the Director of Traffic to make reasonable traffic regulations and prescribe penalties, within limits, of fine or imprisonment.

CONCLUSION

The Water Board's regulation providing for special charges for "a use of water contrary to the rules and regulations" is unenforceable because the Board has no authority to make penalty regulations.

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[26] Id. at 511; Viereck v. United States, 318 U. S. 236, 241.
[27] Board of Harbor Commissioners of Port of Eureka v. Excelsior Redwood Co. 26 P. 375.
[28] *Administrative Penalty Regulations,* 43 COL. LAW REV. 213.
[29] *Ibid.*
[30] Charter Art. XIX, § 297B.
[31] 326 Mass. 525, 95 N.E. 2d 666, 667.
[32] Smallwood v. D. C., 17 F. 2d 210.

The Water Board's misapprehension of its authority stems from two sources. First, realizing that the Charter could have given the Board legislative power—which of course a legislature could not do—the Board too readily concludes that it has done so. Second, because of its preconceived belief that it has legislative power, the Board misinterprets the Charter, attaching no significance to the words, "in the matter of".

The Board is by Charter given authority to acquire, conduct and operate a water system and everything incidental thereto, and to make rules and regulations for the use and distribution of water. This cannot be considered a grant of general legislative power. It is a grant of authority similar to that in the *Diaz* case, *supra,* given to the Commissioner of Airport Management. The Water Board is an administrative agency of the people of Denver—no more.

Being an administrative agency, we must look to the case law to determine whether the Board has authority to make penalty regulations. From the cases we learn that unless an agency is specifically given authority to make penalty regulations, it cannot do so.

With the exception of penalizing for late payment or nonpayment of water bills, the Charter gives the Water Board no authority to make penalty regulations. Therefore, it would seem that the penalty regulation of June 24th is invalid.

THE POWER OF THE DENVER WATER BOARD TO ENACT PENALTY REGULATIONS

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On June 24, 1954, the Board of Water Commissioners of the City and County of Denver supplemented their rules and regulations with the following rule, set forth below in full:

> Whenever the management shall discover a use of water contrary to the rules and regulations of the Board, a notice of such misuse shall be given to the occupant of the premises where the misuse occurs informing the occupant of the time and type of misuse. Whenever during a calendar year a second occurrence of misuse shall be found at any premises, a special charge of five dollars ($5.00) shall be imposed upon those premises without regard to whether or not the second misuse was of the same or a different character than the first. Notice of such charge shall be given to the occupant at the time of such second misuse. In case of a third misuse during the same calendar year, a similar procedure shall be followed but the special charge shall be twenty-five dollars

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