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JUDICIAL REVIEW AND THE PUBLIC ASSISTANCE PROGRAMS

RALPH GREENFIELD*

A survey of cases in which appellate courts have reviewed decisions of public assistance agencies suggests that the most important single factor affecting the scope of court review has been the nature of the claim to public assistance as a legally enforcible right. Because of the importance of this factor, consideration will be given initially to some of the cases in which the courts have authoritatively defined the nature of the right or claim to public assistance.

The latter part of this article is concerned with an analysis of those cases which deal with the issue of judicial control over agency decisions. These cases fall into three broad categories. The first includes cases based on statutes that expressly circumscribe the review of agency decisions. The second concerns cases that arose in the absence of statutes authorizing judicial review. The third group of cases stem from statutes providing for a court review of agency determinations. Because of space limitations this article does not include a discussion of the last group of cases.

I. Nature of the Right to Public Assistance

At common law needy persons in England had no legal right or claim to public support. Thus Blackstone tells us that until the reign of Henry VIII, poor and destitute persons were wholly dependent upon the private benevolence of neighbors and the charity of well-disposed Christians.[1] But beginning with the reign of the Tudors, many statutes were enacted which defined the right of indigent persons to receive aid from the local poor relief authorities. One of these statutes, known as the Elizabethan Poor Law (43 Eliz. c. 2 (1601), remained the underlying basis of England's public assistance laws until 1927.[2]

The history of the English poor law is significant, in this context, because it indicates that since the days of the Tudors relief of the poor has been a subject of parliamentary concern and that the legal right to claim public aid has always stemmed from a legislative enactment.[3]

Additional interest attaches to the English poor law because the main features of the assistance laws adopted by the American colonies were based on the Elizabethan Poor Law, and are still to be

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[1] 1 Bl. Comm. 359 (Cooley's Fourth Edition).

[2] For a short history of the English poor law see de Schweinitz, England's Road to Social Security 26 (1943); a more authoritative treatment is to be found in S. and B. Webb, English Local Government: English Poor Law History: Part I, The Old Poor Law (1927).

[3] *Op. cit., supra*, note 2.

found in most state general assistance laws.[4] Later the formal adoption of the English common law by most American states, resulted in the common law concept of the right to public aid being followed in the United States.

The cases discussed below show the relative unanimity with which American courts have followed the English common law rule concerning the right to public assistance.

In a 1911 decision the Iowa Supreme Court had occasion to reiterate the rule that support of the poor was not a municipal function at common law. It found that, by ordinance of the "ancient kings," the poor were to be supported by parsons, church rectors, and by parishioners until, about the time of Henry VIII, the law made paupers a charge on certain municipalities. The court then held, under the facts of the case, that in the absence of a positive legislative enactment, no obligation rested on a municipality to pay expenses incurred for aid to the needy. No duty could be implied since a municipal corporation was not legally or morally obligated to care for the poor. Since the duty is created only by an affirmative statute, it cannot be carried farther than the express provisions of the poor laws. *Cerro Gordo County v. Boone County.*[5] In an early Colorado case the Supreme Court gave adherence to the general rule that paupers could not be considered "public charges" unless expressly made such by statute. *County of Saguache v. Tough.*[6] In a Washington case an amendment to the Mother's Pension Act, which restricted coverage under the law, was challenged on constitutional grounds. The court upheld the statute indicating that no legal obligation rested on the state to assist the indigent. Since the state is not an obligor, it may care for the needy in any manner it pleases. No individual or class can acquire a vested right to be cared for in any particular manner. There is therefore no duty that can be enforced in law. Such relief as the state does provide is legally in the nature of a largess or bounty which may be discontinued at the legislative will. *In re Snyder.*[7] During the great depression of the thirties an applicant for poor relief in Douglas County, Nebraska, sought a peremptory writ of mandamus, requiring the county commissioners to provide aid for his family and all other poor and destitute persons similarly situated. Apparently uninfluenced by the exist-

[4] Riesenfeld and Maxwell, Modern Social Legislation 685-689 (1950); Abbott, Public Assistance 7 (1940). As suggested above, state general assistance statutes developed from the Elizabethan Poor Law. Under such laws aid is extended to needy persons in general. The special or categorical assistance programs, under the Federal Social Security Act (42 U.S.C.A., Sec. 301-306; 601-606; 1201-1206; and 1351-1355) and implementing state laws, provide aid to designated classes of needy persons, such as the aged, dependent children, the blind, and the permanently and totally disabled. The latter laws, because of the many procedural protections accorded claimants, represent a striking departure from traditional poor law philosophy.

[5] 152 Iowa 692, 133 N. W. 132, 39 L.R.A. (N.S.) 161 (1911).

[6] 45 Colo. 395, 101 P. 411 (1909).

[7] 160 P. 13 (1916).

ing emergency, the court followed the general rule that there was no common law liability upon any government unit to assist indigent persons. The court specifically held that the liability if any, must arise by virtue of statutes making it the duty of the county. Hence paupers were not public charges unless made so by statute. *State ex rel. Boxberger v. Burns, et al.*[8] In *People ex rel. Heydenreich v. Lyons,*[9] the Illinois court denied that any governmental unit had a common law duty to aid persons without means of support. Apart from a duty created by statute, the court could discern no legal obligation resting upon either the state or local units to assist the needy. For additional cases in accord see *Town of Morristown v. Town of Hardwick,*[10] *Town of Clearwater v. Town of Garfield,*[11] *Patrick v. Town of Baldwin.*[12]

With the enactment by Congress in 1935 of the Social Security Act the era of modern public assistance legislation in the United States began.[13] Under the stimulus of Federal grants in aid, the states rapidly passed laws, in conformity with the Federal act, providing public aid for the needy aged, blind, and dependent children. These laws, with their provisions for operation of the programs on a uniform state-wide basis, confidentiality of assistance records, payment in cash, and the opportunity for a fair hearing before the state administrative agency, represented a striking departure from the early poor laws.

Despite the new substantive and procedural rights conferred by the Social Security Act upon defined classes of the needy, the courts continued to regard the right to public aid as purely statutory and therefore in the nature of a gratuity from the sovereign. One authority has suggested, in explanation of the unchanged judicial attitude, that the draftsmen of the Federal law did not believe it necessary to require, as a condition of the Federal grant, that the implementing state law declare the existence of a legal right. This belief being based on the assumption that the rights created by the Social Security Act automatically became subject to the constitutional guarantees of due process and equal protection under the Fourteenth Amendment.[14] As is well known by specialists in this field, cases decided after the enactment of the Social Security Act have shown this assumption to be an untenable one. While many recent cases can be cited in support of this conclusion, a representative selection should suffice for the purpose of this analysis.

Following the adoption of the basic Washington old-age assistance act, the Washington court interpreted the act as entitling

[8] 270 N. W. 656 (1937).
[9] 374 Ill. 557, 30 N. E. (2d) 46, 50, 132 A.L.R. 511.
[10] 81 Vt. 31, 69 A. 152.
[11] 65 Neb. 697, 91 N. W. 496.
[12] 109 Wis. 342, 85 N. W. 274, 53 L.R.A. 613.
[13] 42 U. S. C. A., Sec. 301-306; 601-606; and 1201-1206.
[14] A. Delafield Smith, "Public Assistance As a Social Obligation," 63 Harv. L. Rev. 266, 268.

a designated class of persons to claim benefits from the State. Such entitlement, however, did no more than confer a statutory privilege. If the privilege was to be dignified by being called a right, it was one that was subject to legislative abrogation. Consequently it was not to be considered a vested right in the sense that it was property or a right that had become fixed in such manner that the beneficiary could not be deprived of it without his consent. *Adams v. Ernst, Director of Social Security et al.*[15] In the case of *Creighton v. Pope County,*[16] the Illinois court made it clear, by way of dictum, that the general rule would not be applicable to rights which had vested because of contributions paid under a pension law into a pension fund. If, as in the instant case, the right to the pension rested on no more basis than a claim to the state's bounty under an assistance statute, such right was not a vested one and the payment was no more than gratuity. For additional recent authorities on the general rules see *Howlett v. State Social Security Commission,*[17] *Chapman v. State Social Security Commission,*[18] *Hardy v. State Social Security Commission,*[19] and *Hart v. Grays Harbor County.*[20]

In the decided cases, where the nature of the right to receive aid has been an issue, the courts are as one in declaring that such right is a bounty or a privilege. Nevertheless, there are holdings by a few courts which suggest an inclination to traverse new pathways.

In *Bowman v. Frost,*[21] the court dealt with the contention that the aid to the blind statute violated the constitutional prohibition against the grant of exclusive public emoluments or privileges to any man or set of men. The act was held valid since the prohibition did not apply to cases where a payment is made to satisfy an "inherent duty." When the legislature makes a commitment by statute to assume an obligation the right of the person coming within the statute attaches. The aid extended to the eligible needy person is not a mere gift or bounty, but is a payment in discharge of a public duty owed by society.

While the Kentucky court gave no authority for its holding that public aid under a statute was not a gift, the case may well become a landmark for the developing law of the future. On this assumption it may be worthwhile to examine the reasoning by which the court reached its conclusion. The court conceded that at common law the state had no duty to assist the underprivileged. It agreed that the legal right to apply for and receive public aid derived from the statute. Query, if no legal duty antecedent to a statute exists, in what sense was the court using the concepts of

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[15] 1 Wash. (2d) 254, 95 P. (2d) 799.

[16] 386 Ill. 468, 54 N. E. (2d) 543, 153 A.L.R. 802.

[17] 347 Mo. 784, 149 S. W. (2d) 806.

[18] 235 Mo. 698, 147 S. W. (2d) 157.

[19] 187 S. W. (2d) 520.

[20] 86 P. (2d) 198.

[21] 289 Ky. 826, 158 S. W. (2d) 945.

"inherent duty" and "public duty"? When the opinion is read as a whole these concepts become less obscure. A civilized society develops through time a sense of obligation toward its needy members. This sense of duty becomes more pervasive through the social fabric. Organized society eventually recognizes a right in its dependent members. It is then that the community by statute makes a commitment that none of its members shall suffer when in need.

In a mandamus proceeding the California State Board of Social Welfare sought to compel the county of Los Angeles to make certain payments of public aid retroactively. In one of three factual situations, the recipient of old-age assistance had requested an administrative hearing before the State Board for the reason that he believed himself entitled to a larger payment than he had been receiving. Before the hearing was held, the county agency redetermined the recipient's need and paid an increased amount as of the date of the redetermination. When the hearing was held by the state agency, the county representative conceded that the initial determination had been incorrect but denied the authority of the State Board to order payment of the proper amount on a retroactive basis. Under these facts, the court unequivocally found a duty to pay which accrued as of the date the applicant was first entitled to receive payment. This duty to pay was the equivalent of a debt due from the county to the applicant. In another situation the county asserted that the payment of aid retroactively to the estate of the deceased recipient would constitute an unlawful gift of public money. The court resolved this issue by ruling that while the assistance law makes the right to recive aid personal and inalienable, it nevertheless does not preclude the residue of assistance remaining after payment, or the right to receive aid which has accrued from being subject to devolution as a common incident of the recipient's property right. *Board of Social Welfare v. Los Angeles County.*[22]

II. PRECLUSION OF JUDICIAL REVIEW BY STATUTE

There is little direct authority on the validity of statutes which directly or by implication curtail judicial review of public aid agency decisions. In lieu of specific authority, it seems appropriate to cite cases affecting other administrative agencies where the agency involved was administering a benefactory program and the program has been considered by the courts as coming within the classification of a gratuity, privilege, or self-imposed claim.

In an Oklahoma case the court upheld the constitutionality of the old-age assistance law which made the decision of the County Assistance Board and the Oklahoma Public Welfare Commission final on questions of fact. The court declared that whenever a government, as a matter of grace, provides for giving a gratuity or bounty within the terms of a statute, it has full power to confer authority on the administrative agency to determine whether the

[22] 27 Cal. (2d) 81, 162 P. (2d) 630.

terms specified have been met as a matter of fact and to deny resort to judicial review as a matter of right. No constitutional issue arises if the method for determining facts is a reasonable one and such method applies to all alike. The court went on to observe that no provision of the Federal Constitution prevented administrative agencies being vested with power to make final decisions on legal questions. *State ex rel. Westbrook v. Oklahoma Public Welfare Commission et al.*[23]

As the statute in the Oklahoma case did not purport to foreclose an appeal to the courts on an issue of law, the point last mentioned in the opinion was clearly dictum. Since as dictum the statement is unsupported by legal reasoning, the conclusion is not wholly persuasive.

In *Helms v. Alabama Pension Commission,*[24] the Pension Commission had removed the petitioner's name from the list of confederate veterans eligible for a pension. Although the enabling act made no provision for an administrative hearing or for court review of agency decisions, the pensioner pursued various administrative and legal remedies seeking to be restored to the pension roll and to have back payments allowed. In the state Supreme Court the constitutionality of the pension law was assailed as not meeting the requirements of procedural due process. However, this argument was rejected by the court which held that where a bounty or gratuity is involved due process does not require that notice and a hearing be given by the commission. On the same premise, the legislature might pursue its own course in setting up methods for the final determination of eligibility under the program. When the legislature creates claims of this type it is not obligated to provide a remedy by judicial review of fact findings made by the administrative agency.

The rationale of the *Helms* decision strongly suggests that due process does not prevent the legislature from making the decision of the Pension Commission final on questions of law as well as fact. Yet the court's actual holding made it clear that denial of judicial review would be limited to fact issues. While the reasons for this limitation were not articulated, it seems reasonable to infer that the court was reluctant to reach a harsh though logical result on the basis of a statute that was silent as to the legislative intention.

In a Federal case the United States Supreme Court found no constitutional question arising under a Congressional statute which conferred final adjudicatory power upon the administrative agency. The statute permitted certain claims by service personnel for personal property losses incident to military service to be reimbursed by the government upon approval by the Treasury Department. It was expressly stipulated that the decision of the department on such claims was to be final and not subject to appeal. The court,

[23] 167 P. (2d) 71.
[24] 231 Ala. 183, 163 So. 805, 163 So. 807 (1935).

speaking through Justice Brandeis, laid down the rule that where the United States imposes claims upon itself through creation of rights in individuals, it is not required to provide a judicial remedy. In instances where rights are created by a statute which provides a special remedy, such remedy is exclusive. If the provision as to the right and the remedy stood alone, however, we would not necessarily hold that the remedy excluded judicial review in situations where the administrative agency's decision involved no issue of fact and the denial of the claim was based upon an interpretation of the statute. In the instant case the statute expressly provided "that any claim which shall be presented and acted on . . . shall be held as finally determined, and shall never thereafter be reopened or considered." These words clearly show an intention to confer upon the Treasury an exclusive jurisdiction and to accord finality to the decision. *U. S. v. Babcock.*[25]

The *Babcock* case thus seems to stand for the proposition that when Congress gratuitously grants certain rights to individuals it can expressly make an agency's adjudication upon these rights final both on matters of fact and of law. The facts of the case show that the claimants appealed the disallowance of their claims by the Auditor of the War Department, and were accorded a hearing before the Comptroller General of the Treasury Department. Yet it is not clear from the opinion whether the decision turned on these facts. It remains an open question, therefore, whether Congress could go so far as to make an agency's decision on a claim of this type final as to the law and the facts and at the same time deny the aggrieved claimant both the right to an administrative hearing and access to the courts.

In *Silberschein v. U. S.*,[26] the question arose as to whether decisions of the Veterans' Bureau upon claims for compensation under the War Risk Insurance Act were subject to judicial review. Administration of the act was vested in the director of the Veterans' Bureau who was given express authority to make rules necessary for the enforcement of the law and to decide all questions arising under the act. The petitioner's compensation for physical disability had been first reduced by the agency and then completely revoked for the reason that his disability had ceased to be compensable. In his action against the agency, the petitioner alleged that the decision was arbitrary and contrary to the weight of evidence in his case. In ruling adversely to these contentions, the Supreme Court held that the statute, which created the asserted right, authorized the director to decide all questions under it and his decision of such questions was conclusive and not subject to judicial review unless the determination was found to be "wholly unsupported by the evidence, or is wholly dependent upon a question of law or is seen to be clearly arbitrary or capricious."

It should be noted here that the rule in the *Silberschein* case

[25] 250 U. S. 328, 39 S. Ct. 464 (1918).
[26] 266 U. S. 221, 45 S. Ct. 69 (1924).

is not inconsistent with that of the *Babcock* case. In the *Babcock* case the court held that Congress, by the compelling language of a particular statute, clearly showed an intent to foreclose resort to the courts on an issue of law. In the *Silberschein* case the court could find no such compelling language in the statute.

For further Supreme Court cases in accord with the rule of the *Silberschein* case see *Crouch v. U. S.*,[27] *U. S. v. Williams*,[28] and *Meadows v. U. S.*[29]

In *Lynch v. U. S.*,[30] the court decided that Congress by enacting section 17 of the Economy Act[31] had abrogated the contractual rights of the beneficiaries under certain renewable term government life insurance contracts in violation of the due process clause of the Fifth Amendment. In deciding this question, the court observed that Congress by section 5 of the Act had authorized the Administrator of Veterans' Affairs to make final decisions on all issues of law and fact arising from claims by veterans to pensions, compensation allowances, and other special privileges. Section 5 thus had nothing to do with War Risk Insurance, and was intended to deny judicial relief even under the exceptional circumstances suggested in the *Silberschein, Williams,* and *Meadows* cases.

The constitutionality of section 5 was not before the court, and its review provisions were clearly collateral to the issue raised by section 17 of the Economy Act. It would therefore seem that the comments of the court on section 5 were essentially dicta.

A case decided by the Sixth Circuit Court of Appeals involved an appeal from a decision of the Veterans' Bureau to decrease a sum due on a War Risk policy because of excess awards previously paid in error. One of the grounds on which the administrative action was challenged was that the decision was made without notice or hearing. The statute under which the erroneous awards had been made denied resort to the courts and made the decisions of the Veterans' agency conclusive on both the facts and the law. The court conceded that at one time the rule prevailed that judicial review was possible when a decision was arbitrary or capricious, wholly unsupported by the evidence, or wholly dependent upon a question of law. This is the rule set out in *Siberschein v. U. S.*[32] It then pointed out that section 5 of the Economy Act did away with judicial review even where such special circumstances were present. For this interpretation of section 5, *Lynch v. U. S.*,[33] was cited. *U. S. v. Mroch.*[34]

It is submitted here that the *Lynch* case is not an actual departure from the rule of the *Silberschein* case. Both cases can be

[27] 266 U. S. 180, 45 S. Ct. 71 (1924).
[28] 278 U. S. 255, 49 S. Ct. 97 (1929).
[29] 281 U. S. 271, 50 S. Ct. 279 (1929).
[30] 292 U. S. 571 (1933).
[31] 38 U. S. C. A., sec. 705.
[32] 266 U. S. 221.
[33] 292 U. S. 571.
[34] 88 F. (2d) 888 (1937).

reconciled with each other just as the early *Babcock* case is reconcilable with the *Silberschein* case. The apparent difference on one hand between the *Babcock* and *Lynch* cases and the *Silberschein* case on the other derives from a difference in the facts. The rule governing all these cases is that where Congress imposes claims upon the United States by creating rights in individuals, it has constitutional power to make the agency's adjudication upon these rights conclusive on matters of fact and of law. The courts, however, will not interpret a statute as making the agency's adjudication of a legal question final unless Congress has manifested its intent by unequivocal language.[35] Access to the courts in the *Silberschein* case was regarded as still open on a legal issue because Congress failed to use compelling language to show its intent.

The later case of *Dismuke v. U. S.*[36] reaffirms the rule of the *Babcock* case and furnishes some authority for the interpretation made just above. In the *Dismuke* case the petitioner had filed a claim with the Veterans' agency for a retirement annuity based on an alleged thirty year period of Federal service. The agency disallowed his claim on the ground that employment as a field deputy United States marshal could not be counted as service as an employee of the United States. The petitioner then obtained a judgment in the district court permitting a recovery of accrued installments of the annuity. The judgment was then reversed by the Court of Appeals on the basis that the district court was without jurisdiction because section 13 of the Retirement Act, which declares that upon receipt of satisfactory evidence the Commissioner of Pensions shall forthwith adjudicate the applicant's claim, must be construed as vesting the adjudication of claims under it solely in the administrative agency, and to the exclusion of the courts. When the case came to the Supreme Court on certiorari, the judgment of the circuit court was affirmed, not for the reason given by that court, but for the reason that a field deputy United States marshal was not considered to be an employee of the United States within the meaning of the Retirement Act. It is clear from the Supreme Court's opinion that little weight was attached to the government's contention that the Retirement Act, by implication, forbids employees to assert in the courts rights acquired under it. The United States is not, the court declared, by the creation of claims against itself, obliged to provide a remedy in the courts. It may elect to withhold all remedy or it may provide an administrative remedy and make it exclusive, however erroneous its exercise. But, in the absence of compelling language, access to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as express authority is given to the

[35] Justice Frankfurter has suggested that the court's construction of these statutes shows its consistent respect for due process in its "basic meaning" even where the distribution of government benefits is concerned. See his concurring opinion in Joint Anti Fascist Refugee Committee v. McGrath, 341 U. S. 167, 71 S. Ct. 624, 645-646.

[36] 297 U. S. 167, 172, 56 S. Ct. 400 (1936).

administrative officer. Hence, if such officer is authorized to decide question of fact, his decision is final unless he exceeds his authority by making a decision which is arbitrary or capricious or unsupported by evidence; or has departed from a procedure which satisfies elementary standards of fairness and reasonableness essential to the conduct of the proceeding authorized by Congress.

It is clear from the court's opinion in the *Dismuke* case, that if the Retirement Act had expressly authorized the administrative officer to make ultimate decisions on issues of law such a provision would have raised no constitutional question. It thereby appears that the court's opinion in the recent *Dismuke* case is consistent with its earlier opinion in the *Babcock* case.

For lower Federal court decisions in accord with the dictum in the *Lynch* case, see *Barnett v. Hines*,[37] *Van Horne v. Hines*,[38] and *Calderon v. Tobin*.[39]

The rule discussed above has been the subject of vigorous criticism by commentators in the field of administrative law. Kenneth Culp Davis has cogently argued that a procedure which the courts regard as a violation of fair play when used to impose a penalty does not become fair when used to withdraw a benefit. He therefore recommends that when an agency decision, regardless of program, involves disputed facts as to an individual—his qualifications, circumstances or past conduct—that individual should be given an opportunity to know the evidence adverse to his interest and to meet it with evidence and argument.[40] Another writer contends that it is unrealistic under contemporary conditions to treat the applicant for a government pension, whose very livelihood may depend upon the receipt of the pension, differently from one who is said to be injured in his personal or property rights. The fact that the state may legally withhold a privilege or a pension by repeal of the enabling law should not mean that the agency can arbitrarily deny the claims of particular individuals without the claimant being entitled to a court review upon the legality of the denial.[41]

In 1946 the Assistant General Counsel of the Federal Security Agency, impressed by the state of decisional law and the omission of declarations of rights from state public aid statutes, made certain suggestions as to how the legal claim to social benefits might be made more effective. He urged that declaratory statements should be written into the statutes which should expressly and specifically affirm "that the benefit is not to be construed as a gratuity but as the creation of a right socially and economically

[37] 105 F. (2d) 96 (1939).

[38] 122 F. (2d) 207 (1941).

[39] 187 F. (2d) 514 (1951).

[40] Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 Yale L. J. 1093 at 1123 (1942).

[41] Schwartz, "Administrative Law: 1942-1951," 51 Mich. L. Rev. 775, at 843-844 (1953).

justified and subject to judicial review and interpretation and to the constitutional guarantees of due process of law and equal protection of law as any other right." [42] In another article the same writer pointed out that the enforceability of justiciable rights to public aid was essentially dependent on the fiscal implementation of the program. Therefore, even where an assistance statute included provisions necessary to the establishment of such rights, the legislature might fail to set aside funds to carry out the program, or to appropriate funds adequate to maintain the standard defined by the statute. Because of these contingencies, Smith recommends that the right to assistance should be defined as a general charge upon the state treasury and supported by a permanent appropriation. To avoid the risk of unpredictable drafts upon the general fund, the provisions establishing the assistance program should be drafted so as to define a determinate undertaking on an objective basis.[43]

III. Review in the Absence of a Statute

Ordinarily in the absence of a statutory review procedure, claimants aggrieved by agency decisions will seek to have a court review the agency's action through mandamus proceedings.[44] Litigants invoke this proceeding by addressing a petition to a court of competent jurisdiction, requesting that a writ of mandamus be issued, and alleging that a certain public official has failed to perform some public duty which the petitioner is entitled of right to have performed. The writ, if issued, takes the form of an order commanding the official to whom it is addressed to perform the duty which the official heretofore has failed to perform.[45] The courts, in passing upon such petitions, refuse or issue the writ in accordance with certain rules of administrative law. These rules briefly stated are that mandamus is a proper remedy for commanding acts of a ministerial nature, for ordering the exercise of official discretion when the official fails to act, and for preventing abuse of discretion, but not for controlling the manner in which discretion is exercised. Also, in many jurisdictions mandamus has been denied on the ground of availability and adequacy of non-statutory or statutory review procedures.[46]

As decisions in a public aid program usually involve the exercise of discretion, it is evident that the rules on the availability of mandamus tend to restrict the number of court appeals by

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[42] A. Delfield Smith, "Community Prerogative and the Legal Rights and Freedom of the Individual," 1946 Proceedings of the National Conference of Social Work 100.

[43] *Op. cit., supra,* note 14, p. 268.

[44] Certiorari is not a practical remedy for the review of administrative action. Almost all authorities agree that certiorari is not available for the review of non-judicial action. See Davis, Administrative Law 779.

[45] The People Ex Rel. Heydenreich v. Lyons, 374 Ill. 557, 30 N. E. (2d) 46, 132 A.L.R. 511.

[46] Davis, Administrative Law 768-772.

public aid claimants. Other problems arising from the use of this remedy stem from the inherent difficulty of deciding what duties are ministerial or discretionary, and what is an abuse of discretion.

The cases discussed below would seem to bear out these conclusions.

A Montana recipient of old-age assistance sought a writ of mandamus to obtain a restoration of the total amount by which his former assistance payments had been reduced and to prevent the agency from continuing to make payments in reduced amounts. The court refused the petition for the following reasons. An appropriation in a fixed amount had been apportioned to the State Board to operate on for a definite period. It then became the board's duty under the statute to adopt a policy which would best serve the purpose of the old-age assistance program within the means furnished for that purpose. Whether it would be wiser for the agency to make full payments and prematurely expend most of the appropriation, or whether the recipients now qualified to receive payments, and the ever increasing number of applicants who may qualify later, would be more equitably assisted by a pro-rata decrease in payments, is wholly a question of administrative discretion vested exclusively by the legislature in the board. It is not a proper judicial function for a court to interfere with such discretionary actions of the agency, where it appears that it is acting within the scope of its authority. *State ex rel. Dean v. Brandjord et al.*[47]

Under facts similar to the *Brandjord* case, a Colorado recipient petitioned the District Court for a writ of mandamus commanding the agency to certify old-age pensions to the state auditor on the basis of $45 monthly, regardless of available funds. The district court issued the writ requested by the petitioner's prayer, and the agency appealed the judgment to the Colorado Supreme Court. On appeal the sole issue before the court was whether or not the agency had authority to pro-rate assistance payments when available funds proved insufficient to meet the needs of qualified claimants. The court declared that if the administrative agency could not properly pro-rate payments, no other body might. Only clerical duties, devoid of any element of discretion, had been conferred upon the state auditor and state treasurer. If the agency could not pro-rate then the full amounts must be certified and the rule "first come first served" applies. Under this rule the fund is quickly expended and late comers take nothing, a plain violation of the constitutional prohibition against discrimination. Upholding the constitutional prohibition would vitiate the $45 per month provision; upholding the latter would nullify the prohibition against discrimination at the expense of those probably most needy. In this emergency, we have no trouble in finding an implied authority to pro-rate. First, that authority is vested in the agency or is not vested; second, said chapter 201 (1937 Colorado Session Laws;

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[47] 92 P. (2d) 273 (1939).

old-age pension enabling statute) must be construed as legislation implementing said chapter 200 (Article XXIV, Colorado Constitution, pertaining to old-age pension); third, said chapter 200 (section 4) expressly limits the agency, in making payments, to "moneys deposited in the old-age pension fund." It has nothing to do with moneys not so deposited. Fourth, discrimination is forbidden; fifth, since errors, if any, made by the county boards, must be corrected before certification, "the amounts approved," as specified in section 19 (chapter 201, 1937 Colorado Session Laws), must mean the payments approved by the state agency, and it is only such amounts that are to be certified and paid, and those are to be paid only "from moneys appropriated." The conclusion is then irresistible that authority to pro-rate is by necessary implication conferred upon the state agency. On the basis of this conclusion the judgment of the district court is reversed. *Fairall v. Redmon.*[48]

In *Colorado Public Welfare Board v. Viles,*[49] the petitioner made application to the county director for aid to the blind. His application was then considered by the local board which determined that the applicant was eligible except that they "did not believe the reports of the three opthalmologists . . . ." Aid to the blind was thereupon denied. Obtaining no relief after an administrative hearing, the petitioner made out an alternative writ of mandamus directed to the state agency. The District Court granted the petition and ordered the agency to pay a blind pension of $30.00 a month. The state agency then appealed to the Supreme Court. The appellate court met the argument that no statutory review is provided, by holding that the district courts under their general jurisdiction and the Supreme Court by writ of error under its constitutional powers may review the decisions of any agency where it is alleged that legal rights have been denied or that the agency is vested with a discretion which it refuses to exercise. However, the mandate of the District Court as directed to the Public Welfare Board should have required the agency to consider the facts and to act. In modifying the judgment of the lower court the court observed:

> The refusal of the Board to exercise discretion neither vested the court with the discretion nor entitled plaintiff to the maximum [payment]. The mandate should have been to act.

The plaintiff in a Federal case sued the Veterans Bureau for accrued disability compensation payments, payable under an award, in the amount of $3,000 plus interest. The district court dismissed the suit and on appeal the Fourth Circuit Court of Appeals sustained the dismissal. The court observed that if the petitioner's contention, that the agency's award fixed the right to compensa-

[48] 107 Colo. 195, 110 P. (2d) 247.
[49] 105 Colo. 62, 94 P. (2d) 713.

tion so that no discretion to withhold payment remained, is correct, a proper remedy was not a suit against the United States to adjudicate a liability which had already been determined by the bureau but a suit against the bureau director for a writ of mandamus to require him, as the officer charged with the duty of making the payment, to discharge the duty. *Smith v. United States.*[50]

In *State ex rel. Westbrook v. Oklahoma Public Welfare Commission et al,*[51] an old-age assistance recipient's name was removed by the agency from the list of eligible recipients. The recipient Westbrook then demanded that his name be restored to the list. Following the rejection of his demand by the agency, Westbrook petitioned for a writ of mandamus so as to have the agency's action overruled. Westbrook's petition was thereupon dismissed by the trial court which upheld the agency's argument that the assistance law made the agency's decisons final on questions of fact and that no court had authority to review its determinations or weigh the evidence. On appeal to the appellate court, the petitioner conceded that the statute made the agency's decision final on issues of fact. However, this admission was used as the premise for the contention that the petitioner was without an adequate remedy and therefore entitled to apply for the extraordinary writ of mandamus. The Oklahoma Supreme Court was not persuaded by this ingenious argument and ruled adversely to Westbrook. It specifically held that mandamus was not a proper remedy unless there is a clear legal right for which the law provides no remedy; or if there is arbitrary or capricious action in the guise of the exercise of discretion that amounts to an abuse of discretion. On review of the record, the court concluded that it would support an eligibility decision of approval or denial. For this reason there was no abuse of discretion by the agency.

The *Helms* case, previously discussed under topic II, also raised a question as to the availability of mandamus. Pursuant to a recommendation of the county grand jury, the Pension Commission removed pensioner Helms' name from the roll of eligible confederate veterans. Helms then applied to the county probate judge for a correction of the agency's alleged erroneous decision. The probate judge, after investigating the facts, certified to the commission that Helms' name should be reinstated on the pension roll and payments allowed back to the date of his removal from the roll. The Pension Commission thereupon considered the certification and decided that its decision to disallow should stand unchanged. Helms now sought and obtained a writ of mandamus, in the Court of Appeals, commanding the commission to restore him to the roll and allow back pay. The commission appealed this judgment to the Supreme Court which ruled adversely to the

[50] 57 F. (2d) 998, 999 (1932).
[51] 167 P. (2d) 71.

petitioner. In reversing the judgment, the court noted that the commission had considered several factors pertaining to the petitioner's claim in addition to the certificate of the probate judge. If the agency had been bound by the certificate and was without discretion, the petitioner clearly would be entitled to the writ. But the agency was not so bound and could properly make an independent investigation of the facts. Consequently the administrative decision on this claim was based on discretion and judgment. A decision, authorized to be reached in this manner, is not subject to modification by mandamus or other judicial review unless the decision is wholly unsupported by the evidence, wholly dependent upon a question of law, or is seen to be clearly arbitrary or capricious. *Helms v. Alabama Pension Commission.*[52]

In a South Dakota case a claimant for old-age assistance was found ineligible by the agency on the basis that he had been receiving support from relatives. The claimant thereupon petitioned for a writ of mandamus commanding the State Social Security Commission to approve his application for old-age assistance. The trial court granted the writ and the agency appealed. On appeal the appellants did not rely on the usual rules for refusing mandamus but contended that when the legislature created claims against the state in the nature of gratuities it thereby intended to eliminate court appeals and to limit appeals by dissatisfied claimants to an administrative hearing before the administrative agency. The court rejected this interpretation of the statute and held that since the legislature had not manifested an intention to give the agency complete discretion in administering the old-age assistance program and although the statute contained no express provision for judicial review, it could not find any indication of an intent to eliminate appropriate judicial remedies. The court then cited the *Dismuke* case as authority for its interpretation. *Wood v. Waggoner.*[53] (Note previous discussion of *Dismuke* case under topic II of this article.)

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[52] 231 Ala. 183, 163 So. 805, 163 So. 807 (1935).
[53] 293 N. W. 188 (1940).