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Administrative Law -- Judicial Review and Separation of Powers

Jerry M. Trammell

NOTES AND COMMENTS

Administrative Law—Judicial Review and Separation of Powers

In re Varner[1] involved an action instituted in superior court for a temporary injunction to restrain enforcement of the county board of education's assignment of Varner to a school in Randolph County until a final decision could be had on an appeal from the action of the board in denying Varner's application for reassignment to a school in Davidson County. The temporary injunction was granted and the supreme court not only sustained the injunction, but also stated that the pending superior court review of the board action denying reassignment would be a matter de novo before the superior court. The superior court would have the same powers, duties, and standards to guide it as the board had in the first instance, and there should be a determination by jury trial as to whether the student was entitled to reassignment to another school.

The legislature has given county and city school boards authority to assign students within their districts to appropriate schools[2] with right of appeal from such action to the superior court.[3] The statutory appeal provision requires a de novo review in the superior court. It directs that court, in the event the board's decision is set aside, to make a reassignment to such school as the court finds the student is entitled to attend.[4] In *Varner* the court did not discuss the question of whether such a statute would be unconstitutional on the ground that it requires the court to perform a non-judicial function in violation of the constitutional mandate that governmental functions be separate and distinct,[5] and the constitutional provision vesting courts with judicial power.[6]

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[1] 266 N.C. 409, 146 S.E.2d 401 (1966).
[2] N.C. GEN. STAT. § 115-176 (1960).
[3] N.C. GEN. STAT. § 115-179 (1960).
[4] N.C. GEN. STAT. § 115-179 (1960):
Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. . . . If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is entitled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend. . . .
[5] N.C. CONST. art. I, § 8.
[6] N.C. CONST. art. IV, § 1.

Basically, the legislature may confer jurisdiction upon courts for limited review of administrative decisions without constitutional difficulties.[7] The general rule, however, is that the constitutional limitation of courts to the exercise of judicial power has been violated when a court upon review is required or permitted to substitute its judgment or discretion for that of the agency as such exercise of judgment and discretion is an administrative function.[8] The underlying rationale seems to be that the constitution vests in courts only judicial power, and the performance of a function that is administrative is not within the power of the court.

The question of whether a judicial or non-judicial function is exercised upon review of administrative decisions is not always easy to answer. The United States Supreme Court has held that Congress could vest the Court of Appeals for the District of Columbia with power to substitute its judgment for that of the Radio Commission upon review of the commission's determination of whether a radio broadcasting license should issue. Although such a function is administrative, it could be vested in that court since it is not created under the Judiciary Article of the Constitution.[9] However, since the Supreme Court is created under the Judiciary Article and therefore vested with judicial power only, the Court held that it could not participate in the administrative process by hearing an appeal from a proceeding in the court of appeals pursuant to its statutory authority to exercise such administrative functions.[10] Later the Radio Act[11] was amended by limiting the scope of review in the court of appeals to questions of law and providing that the findings of fact by the commission would be conclusive unless found to

[7] Harrison v. Civil Serv. Comm'n, 1 Ill. 2d 137, 115 N.E.2d 521 (1953); Massachusetts Bonding & Ins. Co. v. Commissioner of Ins., 329 Mass. 265, 107 N.E.2d 807 (1952); *In re* Wright, 228 N.C. 584, 46 S.E.2d 696 (1948); Fire Dep't v. City of Fort Worth, 147 Tex. 505, 217 S.W.2d 664 (1949).

[8] Peterson v. Livestock Comm'n, 120 Mont. 140, 181 P.2d 152 (1947); Fuller v. Mitchell, 269 S.W.2d 517 (Tex. Civ. App. 1954); see generally, 4 DAVIS, ADMINISTRATIVE LAW TREATISE § 29.10 (1958).

[9] U.S. CONST. art. III. This article, vesting the courts with only judicial power, does not limit the jurisdiction that Congress can confer upon the courts of the District of Columbia as Congress can confer upon those courts broader jurisdiction pursuant to its legislative power over the District under Article I. Congress can vest the courts of the District "not only with the powers of federal courts in the several states but with such authority as a State may confer on her courts." Keller v. Potomac Electric Co., 261 U.S. 428, 443 (1923).

[10] Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).

[11] Radio Act of 1927, ch. 169, 44 Stat. 1162.

be arbitrary or capricious.[12] Under these circumstances the Supreme Court held it did have the power to hear appeals from the reviewing court as the reviewing court was then limited to the exercise of a judicial function. The Court noted that the questions of law were whether the commission applied legislative standards validly set up, whether it acted within the authority conferred, and whether its proceedings satisfied the requirements of due process. It felt that these were appropriate questions for judicial decision.[13] Apparently the Court feels the determination of the legality of administrative action is judicial whereas actual participation in the administrative process by the exercise of independent judgment or discretion as to what the decision of the agency should have been is not judicial.[14]

The question thus presented is not whether the original function was judicial but whether the question presented on appeal requires the exercise of a judicial or non-judicial function. One test employed is a determination of whether the question on review is of the type that courts traditionally decided or whether it is of the kind traditionally handled by the legislature prior to the rise of administrative agencies.[15] Among the specific functions held to be administrative[16] and not exercisable by the courts are the granting or revoking of liquor licenses[17] and banking franchises,[18] the fixing of rents,[19] the selection of school sites,[20] the determination of attorneys' fees in proceedings before the Industrial Commission,[21] and the determinations of zoning boards.[22] On the other hand the exercise

[12] Act of July 1, 1930, ch. 788, 46 Stat. 844, amending 44 Stat. 1169 (1927).

[13] Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

[14] *Compare* Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) *with* Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930) *and* Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923).

[15] Floyd v. Department of Labor & Indus., 44 Wash. 2d 560, 269 P.2d 563 (1954).

[16] The examples are merely illustrative and by no means exhaustive.

[17] De Mond v. Liquor Control Comm'n, 129 Conn. 642, 30 A.2d 547 (1943).

[18] Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896 (1942).

[19] Baldwin Gardens v. McColdrick, 198 Misc. 743, 100 N.Y.S.2d 548 (Sup. Ct. 1950).

[20] Board of Educ. v. Allen, 243 N.C. 520, 91 S.E.2d 180 (1956).

[21] Brice v. Robertson House Moving, Wrecking & Salvage Co., 249 N.C. 74, 105 S.E.2d 439 (1958).

[22] Illinois Bell Tel. Co. v. Fox, 402 Ill. 617, 85 N.E.2d 43 (1949). Here the court held that it was not exercising the administrative function since the review was limited to the question of the legality of the board action.

of a judicial function is required in the determination of whether an agency acted upon authority which could be conferred upon it constitutionally,[23] acted within its statutory authority,[24] acted arbitrarily or capriciously,[25] or in disregard of law,[26] and whether it based its decision on insufficient or incompetent evidence,[27] or committed other errors of law.[28] The North Carolina court appears to have recognized the distinction in *Pue v. Hood*.[29] There the court refused to grant certiorari to review the action of the Commissioner of Banks in denying an application for a franchise. The reasoning was that the action of the commissioner was an administrative function and that there would be no judicial question on review in the absence of allegations as to the unconstitutionality of the Banking Act or allegations of errors of law. The court said:

> The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be and the fact that these acts may affect private rights do not constitute an exercise of judicial powers.[30]

The decision implies, however, that the determination of the constitutionality of the legislative act and the question of whether errors of law were committed would require the exercise of judicial power. It thus appears that the line is drawn between a determination of the legality of the administrative action and the exercise of the precise function entrusted to the agency or officer.

Statutes that confer jurisdiction for de novo review of administrative decisions further complicate the distinction between judicial and non-judicial functions. Upon de novo review does the court decide the same issue presented in the administrative proceeding, or does it merely determine the legality of the administrative decision?

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[23] Texas Liquor Control Bd. v. Jones, 112 S.W.2d 227 (Tex. Civ. App. 1937).

[24] State Bd. of Medical Registration v. Scherer, 221 Ind. 92, 46 N.E.2d 602 (1943).

[25] Burton v. City of Reidsville, 243 N.C. 405, 90 S.E.2d 700 (1956).

[26] *Ibid.*

[27] Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022 (1942).

[28] Brice v. Robertson House Moving, Wrecking & Salvage Co. 249 N.C. 74, 105 S.E.2d 439 (1958).

[29] 222 N.C. 310, 22 S.E.2d 896 (1942).

[30] *Id.* at 314, 22 S.E.2d at 899.

Some courts hold that since de novo review permits the finding of facts anew, it also permits the court to substitute its own independent judgment or discretion for that of the agency upon the facts as found by the court.[31] In so holding those courts do not raise the questions of whether such action would constitute the exercise of a non-judicial function and whether the exercise of a non-judicial function would be permissible. On the other hand, the Connecticut Supreme Court has recognized that the legislature could not vest the judiciary with power to grant or revoke licenses—an administrative function. It interpreted a statute granting de novo review of licensing board decisions not to be a grant of power to substitute its judgment for that of the board, but merely to mean the court would not be confined to the facts found by the board in making its independent judgment as to whether the board acted legally.[32] Also, in Texas it is held that a review de novo of administrative decisions does not vest the courts with the administrative function of determining whether a license, permit, or certificate of convenience should issue, but merely gives the courts authority to determine whether the action of the agency was beyond the power it could exercise constitutionally, beyond its statutory power, or based upon substantial evidence.[33] The North Carolina court applied similar reasoning in *In re Wright*[34] where the court found that a de novo review of the revocation of a driver's license required the exercise of a judicial and not an administrative function. The decision was based on the fact that no discretion was given the court to grant or revoke the license and the court had authority only to review the facts upon which the agency based its decision.

In view of the foregoing analysis it does not appear that the question of whether a judicial or an administrative power is exercised is concluded by whether or not the court is required to find facts anew. It is the type of determination the court is required or permitted to make upon such facts found that determines the nature

[31] Carnegie v. Department of Pub. Safety, 60 So. 2d 728 (Fla. 1952); Dimitroff v. State Indus. Acc. Comm'n, 209 Ore. 316, 306 P.2d 398 (1957); Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939); Harrison v. Hopkins, 48 R.I. 42, 135 Atl. 154 (1926).

[32] De Mond v. Liquor Control Comm'n, 129 Conn. 642, 30 A.2d 547 (1943).

[33] Texas Liquor Control Bd. v. Jones, 112 S.W.2d 227 (Tex. Civ. App. 1937).

[34] 228 N.C. 584, 46 S.E.2d 696 (1948).

of the power exercised.[35] It appears that a determination as to the legality of an administrative decision, although made upon de novo review, requires a judicial determination, whereas a determination of whether a license should be revoked or an assignment made to one school or another requires the exercise of administrative power.

If the review of reassignment proceedings in *Varner* had been merely de novo, it appears that an interpretation in favor of its constitutionality could have been had. However, the court correctly interprets the statute to vest the court with the authority to make the assignment to such school the court finds the student is entitled to attend.[36] Such authority is the same authority originally given the administrative agency.[37] The exercise of this authority by the courts seems inconsistent with the constitutional provisions vesting courts with judicial power[38] and requiring governmental functions to be separate and distinct.[39] Indeed, the court stated in *Burton v. City of Reidsville*:[40] "In any event, we operate under the philosophy of the separation of powers, and the courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials."[41]

It is submitted that the court should decline to exercise the administrative function of assigning students to schools and confine its review to the question of the legality of the administrative decision. It may be argued that there is little difference in holding the decision of an agency to be arbitrary or capricious on the one hand and entering an order for reassignment on the other. But such an argument disregards the historical experience with tyrannical government giving rise to the separation philosophy. It also ignores the need for separation in obtaining more efficient administration of governmental functions. A consequence of requiring or permitting courts to make these administrative determinations could be the burdening of the courts with an almost infinite volume of such determinations

[35] For a thorough analysis on this point see Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 161 S.W.2d 1022 (1942).

[36] Consider the language of the act as quoted in note 5 *supra*. For the court's interpretation see *In re* Varner, 266 N.C. 409, 417, 146 S.E.2d 401, 409 (1966); *In re* Hayes, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964).

[37] N.C. GEN. STAT. § 115-176 (1960).

[38] N.C. CONST. art. IV, § 1.

[39] N.C. CONST. art. I, § 8.

[40] 243 N.C. 405, 90 S.E.2d 700 (1956).

[41] *Id.* at 408, 90 S.E.2d at 703.

to the detriment of efficient performance of their judicial duties. A further consequence would be the frustration of the primary objective sought by creation of administrative agencies, *i.e.*, to provide for disposition of specialized and complicated problems by agencies equipped with expert knowledge and experience essential to more efficient disposition of such problems.

JERRY M. TRAMMELL

Admiralty—Recovery of Counsel Fees as Damages in Maintenance and Cure Actions

In *Gore v. Maritime Overseas Corp.*[1] the libellant, a seaman with an extended history of back trouble, brought six consolidated admiralty actions against shipowners for maintenance and cure. Although it was impossible to establish the origin of the seaman's back condition, it was established that the libellant had had separate attacks while aboard different ships, followed by periods of remission sufficient to make him fit for duty. The owners of the ships upon which an attack occurred were found to be primarily liable for the seaman's maintenance until he again became fit for duty. The owners of the ships upon which the seaman became ill or disabled due to an attack that had occurred on a previous ship, but from which the seaman had not yet obtained maximum cure, were held to be secondarily liable for the libellant's maintenance. In each of the claims for maintenance and cure, the recovery of counsel fees was allowed as an element of damages. Secondarily liable shipowners were even awarded recovery from primarily liable shipowners of counsel fees that the former were obligated to pay the seaman.

Traditionally, counsel fees have not been an element of recovery for maintenance and cure actions.[2] However, in 1962, the United States Supreme Court in the historic decision of *Vaughan v. Atkinson*,[3] a maintenance and cure action, awarded counsel fees to the

[1] 256 F. Supp. 104 (E.D. Pa. 1966).

[2] In maintenance and cure claims, the courts have allowed consequential damages, Sims v. United States of America War Shipping Administration, 186 F.2d 972 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951); and necessary expenses, Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932).

[3] 369 U.S. 527 (1962), *reversing* 291 F.2d 813 (4th Cir. 1961), 200 F. Supp. 802 (E.D. Va. 1959).