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Administrative Law -- Judicial Review in State and Federal Courts -- Determination of Validity of Rules and Regulations Before Their Application in Specific Cases

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NOTES AND COMMENTS

Administrative Law—Judicial Review in State and Federal Courts—Determination of Validity of Rules and Regulations Before Their Application in Specific Cases

Whether or not administrative rules and regulations may be reviewed by the courts at the instance of one who is either directly or indirectly affected by them but to whom they have not been applied is a question that has not been presented to the courts very often. The North Carolina Supreme Court considered this question in *Duke v. Shaw*[1] and decided that the statute under which the plaintiff proceeded did not give him the right to have the court determine the validity of these regulations. However, an examination of federal and state authorities reveals several possible remedies not considered in the North Carolina case.

In the *Duke* case the complainant, a hotel operator, filed a petition for review asking the court to proceed under G.S. §§ 143-306 to -316[2] and declare invalid regulations issued by the Commissioner of Revenue which determined that sales of supplies and equipment to hotels, motels, and others renting rooms were sales to consumers and therefore subject to the sales tax. The Commissioner demurred on the ground that the petition did not state a cause of action since it did not allege the payment by or assessment of any taxes against the petitioner. The trial court sustained the demurrer and the supreme court affirmed. In effect the court held that there could be no judicial review under this statute of administrative regulations prior to their application in a specific case.[3]

The state law on this point is conflicting. The collected cases involve "rules," "regulations," "orders," and "resolutions" of administrative agencies, but the designation is of no importance since the substance is the same.

Some of the more liberal states have adopted section 6 of the Model State Administrative Procedure Act.[4] That section provides that one

[1] 247 N.C. 236, 100 S.E.2d 506 (1957).

[2] N.C. GEN. STAT. §§ 143-306 to -316 (Supp. 1957). These statutes will be discussed later herein.

[3] *Cf.* North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944), a case decided before the passage of N.C. GEN. STAT. §§ 143-306 to -316 (Supp. 1957). The supreme court held that the appellants were not entitled to appeal to the courts from the action of the Commission in adopting and promulgating an amended rule. The court said that no appeal could be taken from an order by which the Commission adopts a general regulatory rule of supervisory nature.

[4] 9C UNIFORM LAWS ANN. 179, 181 (1957).

may petition for a declaratory judgment as to the validity of any rule when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. Wisconsin,[5] California,[6] and Missouri[7] have adopted this section of the act, and although no Wisconsin case interpreting the section was found, the Missouri and California courts have interpreted it liberally.[8]

In *Butler v. Rude*[9] the Kansas Supreme Court allowed plaintiff, a licensed embalmer, to maintain an action to enjoin the State Board of Embalming from enforcing a rule made by the Board though he alleged only that he was informed that the Board intended to enforce the rule. The court said that plaintiff was not compelled to await action by the Board suspending his license, or refusing to issue or renew his license, in order to test the Board's power to adopt the rule.

The North Dakota Court justified a contrary decision[10] with the "general rule . . . that an injunction will not be granted to stay criminal or quasi-criminal proceedings . . . ."[11] In that case plaintiff prayed that an order of the Board fixing a schedule of minimum prices be declared void and that the Board be enjoined from enforcing or attempting to enforce the order. The statute under which the Board acted gave it power to issue rules, orders, etc. with criminal sanctions. The court said that plaintiff had an adequate remedy at law since he could use the alleged invalidity of the order as a defense to any prosecution against him under the act.

In *Zangerle v. Evatt*[12] the Ohio court declined to review at the instance of county auditors a rule for the classification of property used in the refining of petroleum. The Tax Commissioner had adopted the rule and the plaintiffs had had it reviewed by the Board of Tax Appeals.

[5] WIS. STAT. ANN. § 227.05 (1955). [6] CAL. GOV'T CODE § 11440 (1955).
[7] MO. ANN. STAT. § 536.050 (Vernon 1953).
[8] Harney v. Contractor's State License Bd., 39 Cal. 2d 561, 247 P.2d 913 (1952). Plaintiff, an engineering contractor, sought a declaratory judgment as to the validity of a regulation of the Contractor's State License Board requiring a separate license for each of thirty-one different classes of specialty work. The court held that, under the statute, the allegation was sufficient to allow plaintiff to contest the regulation. For a discussion of the case and code sections involved see Note, 41 CALIF. L. REV. 341 (1953). See also Knudsen Creamery Co. v. Brock, 37 Cal. 2d 485, 234 P.2d 26 (1951).
In King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947), plaintiffs joined a union in violation of a rule of the Board of Police Commissioners and sought a declaratory judgment that the rule was unconstitutional and an injunction restraining defendants from instituting disciplinary action against them. Although no action had been taken against them at the time, the court held that the validity of the rule could be determined.
[9] 162 Kan. 588, 178 P.2d 261 (1947).
[10] Williams v. State Bd. of Barber Examiners, 75 N.D. 33, 25 N.W.2d 282 (1946).
[11] *Id.* at 36, 25 N.W.2d at 284.
[12] 139 Ohio St. 563, 41 N.E.2d 369 (1942).

Plaintiffs contended that the court had jurisdiction to review under a constitutional provision which provided that the court should have "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."[13] The court held that "proceedings" meant judicial or quasi-judicial proceedings, pointing out that no concrete application of the rule was involved in the case.

In *Peters v. New York City Housing Authority*[14] the plaintiffs attacked a resolution of the Housing Authority as unconstitutional and sought to enjoin its enforcement. The resolution required residents of federally-aided housing projects to sign a certificate of non-membership in organizations designated as subversive by the Attorney General of the United States. Those who refused were to be evicted. The certificates had been issued for signing but no further action had been taken when petitioner brought the action. The New York Court of Appeals refused to decide the case on the constitutional ground because there were two other possible grounds of decision: (1) that the Authority, in adopting the resolution, acted in excess of statutory authority; and (2) that the resolution was an incorrect interpretation of the statute. Since the lower courts had not considered these questions, the court of appeals remitted the case to the special term for their determination. In effect this amounted to a holding that the plaintiffs could contest the resolution.[15]

At least two states, Minnesota and New Jersey, have held that their Declaratory Judgment Acts permit judicial review of administrative regulations prior to their application to specific parties. In *Minneapolis Federation of Men Teachers v. Board of Educ.*[16] the defendant Board passed a resolution requiring all teachers to sign a written contract for the ensuing year. Some individual plaintiffs had acquired a tenure status and objected to signing such a contract. They sought injunctive relief to preserve the status quo of the parties before they were asked to sign the contracts. The Board contended there was no justiciable controversy. The court held the plaintiffs were entitled to a declaratory judgment although no relief could be claimed beyond that of declaring plaintiffs' rights so as to relieve the uncertainty. They had a judicially protectible right that was being placed in jeopardy by the ripening seeds of an actual controversy.

[13] OHIO CONST. art. IV, § 2 (1912).
[14] 307 N.Y. 519, 121 N.E.2d 529 (1954).
[15] *But cf.* Kent Stores, Inc. v. Murdock, 278 App. Div. 946, 105 N.Y.S.2d 111 (2d Dep't 1951). The facts of the case were not set out, but in a memorandum decision the court said that the purpose of the proceeding was to obtain an opinion essentially of an advisory nature and that neither the Board nor the courts had jurisdiction to entertain such a proceeding.
[16] 238 Minn. 154, 56 N.W.2d 203 (1953).

The New Jersey case of *Sperry & Hutchinson Co. v. Margetts*[17] involved a ruling by the Motor Fuels Tax Bureau to the effect that the issuance of S & H discount stamps by gasoline retailers constituted a violation of a statute. Plaintiff was in the business of licensing retailers to use its stamps. The superior court held that plaintiff was entitled to maintain the action under the Declaratory Judgment Act, saying that there was a "concrete, contested issue" and that there existed a "justiciable controversy." The supreme court affirmed[18] without discussing the right of plaintiffs to maintain the action.[19]

The Supreme Court of the United States has been increasingly liberal in allowing judicial review of administrative regulations before their application to definite parties in specific factual situations. A leading case is *Columbia Broadcasting System v. United States*.[20] The Federal Communications Commission promulgated regulations which purported to require the Commission to refuse to grant a license to any broadcasting station which entered into certain defined types of contracts with any broadcasting network organization. A supplemental "minute" of the Commission allowed stations to contest the validity of the regulations without danger of losing their licenses.

The complaint alleged that many stations, fearing the loss of their licenses, were refusing to negotiate for or renew affiliation contracts and threatened to cancel existing affiliation contracts containing the forbidden provisions, and that as a result plaintiff was going to suffer great financial loss.

The Court held that the Commission's action was an "order" within the meaning of section 402(a) of the Communications Act of 1934[21] and therefore reviewable under the Urgent Deficiences Act[22] and that this plaintiff had stated a cause of action in equity. The theme of the Court's reasoning was that in view of the irreparable injury with which plaintiff was threatened the plaintiff's right to intervene in a proceeding upon an application for a license by a station was not an adequate remedy.

It should be noted that the regulations did not in terms apply to any network and had not been applied to any station. The Court said that these facts did not affect plaintiff's standing to maintain the suit in equity,

[17] 25 N.J. Super. 568, 96 A.2d 706 (Ch. 1953), *aff'd*, 15 N.J. 203, 104 A.2d 310 (1954).

[18] 15 N.J. 203, 104 A.2d 310 (1954).

[19] See Abelson's, Inc. v. New Jersey State Bd. of Optometrists, 19 N.J. Super. 408, 88 A.2d 632 (App. Div. 1952), which involved a regulation of the New Jersey State Board of Optometrists. The plaintiff's right to contest the regulation was not questioned, though it did not appear that the plaintiff had violated the regulation or that the Board had taken steps to enforce it.

[20] 316 U.S. 407 (1942).

[21] 48 STAT. 1093 (1934), 47 U.S.C. § 402(a) (1952).

[22] 38 STAT. 219, 220 (1913).

that it was enough that the regulations purported to operate to alter and affect adversely its contractual rights and business relations with station owners.

Justice Frankfurter was joined by Justices Reed and Douglas in a dissent based on the absence of any immediate, direct effect of the regulations on the plaintiff or station owners. He distinguished the cases relied on by the majority on the ground that in each of those cases criminal prosecution, injunction, or fine could be used immediately to enforce the command of the administrative agency. He was of the opinion that even irreparable loss was not a sufficient ground for judicial review.[23]

Several cases decided since the *CBS* case have extended that decision. In *FCC v. American Broadcasting Co.*[24] the Supreme Court, in a unanimous decision, did not consider or question the plaintiff's right to sue to enjoin and have set aside regulations of the Federal Communications Commission which interpreted a statute prohibiting the broadcasting of so-called "give away" programs. The Commission was to refuse any *station's* application for a construction permit, license, etc., if it broadcast the forbidden programs. The plaintiff was a network that made such programs available to stations for broadcast.

Under the Interstate Commerce Act carriers of agricultural commodities were exempt from the requirement of a certificate of public convenience and necessity. *Frozen Food Express v. United States*[25] was an action to enjoin and have set aside an order of the Interstate Commerce Commission that listed agricultural and nonagricultural commodities. Although the Interstate Commerce Act provided criminal and other sanctions for violation of the act, the order did not command compliance with the order or the act. The Commission merely threatened to enjoin transportation of the commodities which plaintiff claimed were agricultural. The Court held that the plaintiff was entitled to maintain the action under the Administrative Procedure Act.[26] The reasoning of the majority in the *CBS* case was relied upon in part.

The problem in *Frozen Food Express* closely parallels that in the principal case, where the opposite result was reached. The Administrative Procedure Act provides for judicial review of any agency action by any person suffering legal wrong or who is adversely affected or aggrieved by such action.[27] Agency action is defined to include

[23] For a more exhaustive consideration of this and other cases and closely related matters, see DAVIS, ADMINISTRATIVE LAW 640-63, 676-80 (1951); Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1326 (1955).
[24] 347 U.S. 284 (1954).
[25] 351 U.S. 40 (1956), 70 HARV. L. REV. 156 (1957).
[26] 60 STAT. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).
[27] 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1952).

agency rules and orders.[28] The North Carolina statute[29] provides for judicial review at the instance of any person aggrieved by any final administrative decision. "Administrative decision" is defined as any decision, order, or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after opportunity for agency hearing.[30] "Administrative decision" as thus defined appears to cover determinations which are judicial in nature rather than regulations.[31]

United States v. Storer Broadcasting Co.[32] was decided a short time after the *Frozen Food Express* case. The regulations in that case provided that licenses for broadcasting stations would not be granted if the applicant had an interest in other stations beyond a limited number. Plaintiff sought review under the Administrative Procedure Act[33] and the statute (hereafter referred to as section 1034) that was the successor to the Urgent Deficiencies Act.[34] In holding that Storer had standing to sue, the Court relied on the *CBS, ABC,* and *Frozen Food Express* cases. The decision emphasized that "the Rules now operate to control the business affairs of Storer."[35]

The Court cited the Administrative Procedure Act[36] for the proposition that this was final agency action and went on to justify review under section 1034. Justice Harlan dissented on the ground that Storer was not a party "aggrieved" by a final "order" within the meaning of section 1034. He did not discuss the review provisions of the Administrative Procedure Act.[37] He distinguished the *CBS* holding that the chain broadcasting regulations were an "order" on the basis of the "coercive effect" of those regulations. He said: "The holding of the Court today amounts to this: that regulations which impose no duty and determine no rights may be reviewed at the instance of a person who alleges no in-

[28] 60 STAT. 237 (1946), 5 U.S.C. § 1001 (1952).
[29] N.C. GEN. STAT. § 143-307 (Supp. 1957).
[30] N.C. GEN. STAT. § 143-306 (Supp. 1957).
[31] This conclusion seems to be strengthened by another factor. At the same session and in successive chapters of the session laws, the legislature passed N.C. GEN. STAT. §§ 143-306 to -316 (1953) and N.C. GEN. STAT. §§ 150-9 to -34 (1953). The latter sections regulate licensing boards. G.S. § 150-32 provides that one may petition for a declaratory judgment as to the validity of any rule adopted by any of the boards covered by the statute when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The fact that such provision was included in the latter act but not the former seems significant. For an explanation of G.S. § 150-32, see JOHNSTON, ADMINISTRATIVE PROCEDURE 124-26 (1953).
[32] 351 U.S. 192 (1956), 44 CALIF. L. REV. 938, 70 HARV. L. REV. 156 (1957).
[33] 60 STAT. 243 (1946), 5 U.S.C. §§ 1009(a), (c) (1952).
[34] 64 STAT. 1130 (1950), 5 U.S.C. § 1034 (1952).
[35] 351 U.S. at 199.
[36] 60 STAT. 237 (1946), 5 U.S.C. §§ 1001(c), (g) (1952).
[37] 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1952).

jury, to settle whether a future application of the regulations that may never occur would be valid."[38] This statement seems to be an accurate appraisal of the decision.

The great difference in the position of the plaintiffs in the several cases becomes obvious when one considers the possible harm that might result to each while waiting for the regulations to be applied. The *CBS* decision was based on the irreparable injury that plaintiff would suffer by reason of contracts lost on account of the regulation.[39] The *Storer* case seemed to require no threat of irreparable injury in order to justify judicial review of a regulation, but merely that the regulation control the business affairs of the party seeking review. Thus the Supreme Court has become increasingly liberal in allowing direct review of administrative regulations without waiting for them to be applied.

The cases from the other states reveal that some of the successful plaintiffs asked for an injunction or a declaratory judgment. No North Carolina case was found in which the plaintiff asked for either of these remedies in seeking review of an administrative regulation. The New Jersey court granted relief to the Sperry & Hutchinson Company[40] under the New Jersey Declaratory Judgment Act.[41] The Minneapolis Federation of Men Teachers[42] also got relief under the Minnesota act.[43] The North Carolina Declaratory Judgment Act[44] does not differ in any material particular from the acts of those states. It might be that a contrary decision would have been reached if the plaintiff in the *Duke* case had sought a declaratory judgment under the North Carolina act.

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Constitutional Law—Congressional Investigations—Contempt of Congress

Defendant, an instructor at Vassar College, was subpoenaed to appear before the House Un-American Activities Committee and was asked by the Committee a series of questions tending to elicit from him whether he was or had been a member of the Communist Party and whether he knew that one Crowley, who had identified defendant as a member of a communist group while the latter was a student and instructor at the University of Michigan, had been a member of the

[38] 351 U.S. at 212.
[39] See Justice Harlan's dissent in the *Storer* case, 351 U.S. at 211.
[40] Sperry & Hutchinson Co. v. Margetts, 25 N.J. Super. 568, 96 A.2d 706 (Ch. 1953), *aff'd*, 15 N.J. 203, 104 A.2d 310 (1954).
[41] N.J. STAT. ANN. § 2A:16-52 (1952).
[42] Minneapolis Federation of Men Teachers v. Board of Educ., 238 Minn. 154, 56 N.W.2d 203 (1953).
[43] MINN. STAT. ANN. §§ 555.01-.15 (1947).
[44] N.C. GEN. STAT. §§ 1-253 and 1-256 (1953).