

10-15-1987

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David J. Agatstein

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Recommended Citation

David J. Agatstein, *Recent Cases of Interest*, 7 J. Nat'l Ass'n Admin. L. Judges. (1987)
available at <http://digitalcommons.pepperdine.edu/naalj/vol7/iss2/5>

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RECENT CASES OF INTEREST

During recent months there has been an upsurge of judicial activity in the area of administrative law. As usual, the cases are collected and ably summarized by Prof. Bernard Schwartz in the Administrative Law Review. 1/

Three of the cases discussed by Prof. Schwartz may have particular interest for the readers of this Journal. In Commodities Futures Trading Comm'n v. Schor, 2/ the Supreme Court continued its apparent retreat from the doctrine of Northern Pipeline, 3/ and held that the CFTA may decide state law counterclaims in reparation proceedings voluntarily brought before that agency. In University of Tennessee v. Elliott, 4/ the Supreme Court held that a decision by a State ALJ, unreviewed by the State courts, finding that no racial discrimination occurred, will be given collateral estoppel effect in a subsequent federal district court civil rights action based on the same circumstances, if the ALJ's decision would be given that effect under the applicable state law. Finally, in Utica Packing Co. v. Block, 5/ the U.S. Court of Appeals for the Sixth Circuit rendered an instructive opinion on the independence of adjudicatory officers. Selections from that opinion are reprinted below (pp. 107-114).

Other important cases dealing with separation and delegation of powers, rulemaking, investigatory power and

1/ Administrative Law Cases during 1986 39 Ad. L. Rev. 117. The Administrative Law Review is a publication of the Administrative Law Section of the American Bar Association. Prof. John H. Reese, Editor-in-Chief of the Administrative Law Review has once again generously granted permission to reproduce portions of Prof. Schwartz' article.

2/ 106 S. Ct. 3245 (*infra*).

3/ Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982).

4/ 106 S.Ct 3220 (1986).

5/ 781 F.2d 71 (6th Cir. 1986).

judicial review are discussed by Prof. Schwartz, but are omitted from this issue of the NAALJ Journal. While some of these may be discussed in future issues, informed readers will want to consult the Spring 1987 issue of the Administrative Law Review, from which two excerpts are here reprinted.

Agencies Versus Courts

The public rights/private rights distinction, which the Northern Pipeline 6/ plurality opinion revived as the criterion upon which delegations of adjudicatory authority to agencies may turn, was repudiated in last year's Thomas case. 7/ As Justice O'Connor explains Thomas, "this Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights." 8/ This statement was made in Commodity Futures Trading Comm'n v. Schor, 9/ where the Court further refined the subject of administrative adjudicatory authority. At issue in Schor was the power of the CFTC to assume jurisdiction over common law counter-claims in a reparations case brought before it by a private party. The Court held that the agency's interpretation of the statute as giving it the power to take jurisdiction over counterclaims was reasonable and well within the scope of its delegated authority. The lower court had ruled, however, that Congress did not possess the constitutional authority to vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law.

The Supreme Court reversed. According to it, Article III does not confer an absolute right to the plenary consideration of every claim by an Article III court. In determining the extent to which a congressional decision to authorize adjudication of Article III business in a non-Article III tribunal is valid, the Court has considered

6/ Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

7/ Thomas v. Union Carbide Co., 105 S.Ct. 3325 (1985).

8/ CFTC v. Schor, 106 S.Ct. 3245 (1986).

9/ 106 S.Ct. 3245 (1986).

various factors. Among them, says the opinion of Justice O'Connor, "are the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III." 10/

Here the delegation, like that in the leading case of Crowell v. Benson, 11/ was limited to a particularized area of law and the agency was not given "all ordinary powers of district courts." 12/ Moreover, its orders are reviewed on the same basis as the agency in Crowell. Under Thomas, the fact that the counterclaim is a "private" right is not determinative. The same is true of the state law character of the claim. That the counterclaim is resolved by a federal rather than a state tribunal does not unduly impair state interests, since a federal court could decide a counterclaim such as the one asserted here under its ancillary jurisdiction. The fact that a federal agency rather than a federal court hears the state law claim does not give rise to a greater impairment of principles of federalism. The Court's conclusion is thus that "the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III." 13/

It should, however, be noted that the Schor opinion indicates that there may be a line beyond which delegations of adjudicatory authority to agencies may not go. Justice O'Connor gives the example of "Congress [creat]ing a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts

10/ Id. at 3258.

11/ 285 U.S. 22 (1932).

12/ 106 S.Ct. at 3259.

13/ Id. at 3261.

without any Article III supervision or control and without evidence of valid and specific legislative necessities." 14/

Such a scenario is, of course, far removed from reality in terms of what may happen in the foreseeable future. Short of it, virtually all delegations of adjudicatory authority should be valid, as long as the decisions of the agency concerned are subject to judicial review. Due process is not limited to judicial process. There is no longer, if there ever was, a valid dichotomy between what is judicial and what is administrative, at least on the civil side of the law.

Schor confirms the movement that has occurred, during this century, away from the notion that judicial power may not be delegated to agencies--that administrative adjudicatory power must be "softened by a quasi" 15/ before it may be validly exercised. The courts have come to recognize that agency adjudicatory authority is, from an analytical point of view, exactly like the power to decide cases possessed by the courts. The trend to that effect has been reaffirmed by the Supreme Court in Ohio Civil Rights Comm'n v. Dayton Christian Schools. 16/ The Court there held that the Younger doctrine, 17/ under which a federal court should not enjoin a pending state judicial proceeding, also applies to a pending state administrative proceeding, so long as in the course of that proceeding plaintiff will have a full and fair opportunity to litigate his constitutional claim. The key to the holding is the recognition that administrative proceedings that are "judicial in nature" should, "in proper circumstances command the respect due court proceedings." 18/ If that is true, the reasons which counsel application of the Younger abstention doctrine in cases involving state courts should also apply here.

14/ Id. at 3260.

15/ Springer v. Philippine Islands, 277 U.S. 189, 210 (1928).

16/ 106 S.Ct. 2718 (1986).

17/ Younger v. Harris, 401 U.S. 37 (1971).

18/ 106 S.Ct. at 2723.

The same approach governs the decision in University of Tennessee v. Elliott, 19/ which held that in federal court actions under the reconstruction-era civil rights statutes, the resolution by a state agency, acting in its adjudicatory capacity, of disputed issues of fact which are properly before it and which the parties have had adequate opportunity to litigate, has the same preclusive effect to which it would be entitled in the state's courts. In the Court's view, traditional principles of preclusion should be applied to "the burgeoning use of administrative adjudication in the 20th century." 20/ Hence, "it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity." 21/

As the Court saw it, "Giving preclusive effect to administrative factfinding serves the value underlying general principles of collateral estoppel, enforcing repose." 22/ This value, which vindicates the interest in avoiding the cost and vexation of repetitive litigation and the interest in conserving judicial resources, is equally implicated whether the factfinding is by a court or an agency. Accordingly, when a state agency decides issues of fact in an adjudicatory proceeding, the federal courts must give the agency factfinding the same preclusive effect to which it would be entitled in the state's courts. 23/

* * *

19/ 106 S.Ct. 3220 (1986).

20/ Id. at 3226.

21/ Id.

22/ Id. (citation omitted).

23/ Id. at 3227. See Wiconisco Creek v. Kocher Coal Co., 641 F.Supp. 712 (M.D. Pa. 1986) (Pa. Dept. of Environmental Resources not "court"); United States v. Doherty, 786 F.2d 491 (2d Cir. 1986) (magistrates and other court personnel not "agency" within APA).

PROCEDURE PROBLEMS

The most important administrative procedure question dealt with by the cases was that of the applicability of the exclusionary rule in agency proceedings. 24/ The Supreme Court answered the question in the negative in the Lopez-Mendoza case 25/ three years ago. Several cases apply the Lopez-Mendoza rule to different administrative proceedings. 26/ Of greater potential significance, however, are two state cases which refuse to follow Lopez-Mendoza. Thus, the Oklahoma court has specifically held that the exclusionary rule is applicable in a hearing resulting in the discharge of a firefighter for misconduct. 27/ Evidence had been presented at the hearing which had been obtained under an invalid search warrant. The court held the evidence improper and the discharge consequently improper.

The Oklahoma court recognized the contrary approach of the Supreme Court, but it ruled that the protection afforded by the comparable Oklahoma constitutional provision was greater than that under the Supreme Court's interpretation of the Fourth Amendment. The latest Supreme Court cases on the exclusionary rule "are too restrictive for application under the standards of Oklahoma's fundamental law." 28/ They leave "this Court . . . unfettered in

24/ For decisions holding there is a due process right to be heard in liquor license cases, see Sea Girt Ass'n. v. Borough, 625 F.Supp. 1482 (D.N.J. 1986); Fueston v. Colorado Springs, 713 P.2d 1323 (Colo. App. 1985).

25/ INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

26/ Smith Steel Co. v. Brock, 800 F.2d 1329 (5th Cir. 1986) (OSHA proceedings to correct safety and health standard violations); Pullin v. Louisiana State Racing Comm'n, 477 S.2d 683 (La. 1985); Deshields v. Chester School Dist., 505 A.2d 1080 (Pa. Cmwlth. 1986).

27/ Turner v. City of Lawton, No. 61,399, slip op. (Okla. July 22, 1986).

28/ Id. at 14.

its enforcement of the Oklahoma exclusionary rule." 29/ There is a similar decision by another state court 30/ and it may be hoped that this may lead other state courts to hold that, despite Lopez-Mendoza, the exclusionary rule is as binding in administrative proceedings as it is in criminal proceedings. 31/

Other cases deal with the different aspects of agency procedure ranging from the notice which begins the administrative process to the decision which is its last stage. As a general proposition, the agency is vested with considerable autonomy with regard to its procedural rules. This point is emphasized in a Sixth Circuit case, which states that review of procedural rules "is narrowly circumscribed" and the court only inquires whether there is a reasonable basis for a challenged rule. 32/

Agency pleadings are to be judged liberally. Thus the Massachusetts court emphasizes that the agency notice need not be drafted with the certainty of a criminal pleading. It is valid as long as enough is told to enable the individual to understand the substance and nature of the grounds upon which the agency is acting. 33/

There were a number of interesting bias cases. The most striking arose out of a decision favorable to the private party by the Department of Agriculture Judicial Officer. The department "violently disagreed" with this decision. The Secretary then replaced the Judicial Officer with a deputy assistant secretary, who was not even a lawyer. Then a petition for reconsideration was filed by the department and granted by the new Judicial Officer. The court ruled that the department's action violated due

29/ Id.

30/ State v. Lampman, 724 P.2d 1092 (Wash. App. 1986).

31/ Compare Smith Steel Co. v. Brock, 800 F.2d 1329, 1331 (5th Cir. 1986) (exclusionary rule applicable where object of OSHA proceeding to punish employer for past violations).

32/ Brown v. NTSB, 795 F.2d 576, 578 (6th Cir. 1986).

33/ Langlitz v. Bd. of Registration of Chiropractors, 486 N.E.2d 48 (Mass. 1985).

process, citing the ancient maxim against permitting anyone to be the judge of his own case. "All notions of judicial impartiality would be abandoned, if the agency could replace the "judge" who had decided against it and present a motion for reconsideration to a new "judge" of its own choosing. "Such manipulation of a judicial, or quasi-judicial, system cannot be permitted." 34/

Bias is, of course, shown where the agency members have a pecuniary and personal interest in the case. 35/ But it is not enough to show that the hearing officer had previously practiced law with the agency prosecutors. 36/ Nor is bias shown by prejudice on the legal or policy issues involved in the case. 37/ Thus the fact that board members had expressed beliefs on the proper scope of chiropractic practice different from plaintiff's did not indicate bias. 38/ The governing principles are well stated by the Louisiana court: a preconceived position on the law is not enough; but the same is not true where the agency member makes an advance commitment on the adjudicative facts. The test is whether he was a disinterested observer or had he, on the contrary, judged the facts in advance. 39/

34/ Utica Packing Co. v. Block, 781 F.2d 71, 78 (6th Cir. 1986).

35/ Salisbury v. Housing Authority, 615 F.Supp. 1433 (E.D. Ky. 1985).

36/ New York State Inspection v. New York State Pub. Employment Relations Bd., 629 F.Supp. 33 (N.D.N.Y. 1984). Compare Babcock Center v. Office of Audits, 334 S.E.2d 112 (S.C. 1985); Collura v. Bd. of Police Comm'rs, 482 N.E.2d 143 (Ill. App. 1985).

37/ NLRB v. Honaker Mills, 789 F.2d 262 (4th Cir. 1986); Kizer v. Dorchester County Bd., 340 S.E.2d 144 (S.C. 1986).

38/ Samuel v. Bd., 712 P.2d 132 (Or. App. 1985). Compare Orange v. Island Creek Co., 786 F.2d 724 (6th Cir. 1986) (adverse rulings not enough to show bias).

39/ Matter of Rollins Services, 481 S.2d 113 (La. 1985). See also Matter of Sorini, 717 P.2d 7 (Mont. 1986) (issue of hearing officer independence not raised at hearing).

It is hornbook law that the rules of evidence are not binding in agency proceedings. 40/ This means, of course, that any evidence is admissible including hearsay if responsible persons would rely on it. 41/ However, most state courts continue to apply the legal residuum rule: agency findings must be set aside if they are supported only by incompetent evidence such as hearsay. 42/

A change in hearing officers or ALJs does not by itself violate due process or the APA. 43/ On the other hand, the SSA "targeting" of ALJs who had high rates of allowing disability benefits was held to infringe upon the claimant's due process rights. 44/ Another case reaches the same result on the SSA attempt to experiment with adversary procedure. Under the SSA experiment a government counsel appears at a disability hearing to present the case against the claimant. This deprives the SSA ALJ of one of

On ex parte communications and evidence see Southwest Sunsites v. FTC, 785 F. 2d 1431 (9th Cir. 1986); Bonanza Corp. v. United States, 642 F.Supp. 1170 (CIT 1986) (internal investigation report); Nationwide Ins. Co. v. Ins. Comm'r, 509 A.2d 719 (Md. App. 1986).

40/ Stigall v. Anchorage Municipality Police & Fire Retirement Bd., 718 P.2d 943 (Alaska 1986).

41/ Id.; Evosevich v. Consolidation Coal Co., 789 F.2d 1021 (3d Cir. 1986); Craig v. Pare, 497 A.2d 316 (R.I. 1985).

42/ Thigpin v. Adm'r, Office of Employment Security, 488 S.2d 1213 (La. App. 1986); Noxubee County Bd. of Education v. Givens, 481 S.2d 816 (Miss. 1985). Compare Ortiz v. Eichler, 794 F.2d 889 (3d Cir. 1986) (cross-exam); Collura v. Bd. of Police Comm'rs, 482 N.E.2d 143 (Ill. App. 1985) (polygraph); Quaker Hill Place v. State Human Relations Comm'n, 498 A.2d 175 (Del. Super. 1985) (medical periodicals and treatise not in evidence).

43/ Aacon Auto v. ICC, 792 F.2d 1156 (D.C. Cir. 1986); Rosales v. Dep't of Labor & Industries, 700 P.2d 748 (Wash. App. 1985).

44/ Barry v. Heckler, 638 F.Supp. 444 (N.D. Cal. 1986).

his "three hats"--that of government advocate. The court considers the experiment to be part of what it terms the "astounding" efforts by "upper echelon [SSA] bureaucrats to control the independence of ALJs." As such, the court holds, the experiment violates both due process and statute: it is "simply nothing more nor less than an attempt by the bureaucracy to control the independence of the ALJs." 45/

It has long been a basic principle that agencies may not issue bare thumbs-up or thumbs-down decisions. Administrative decisions must be supported by adequate findings. Findings are, of course, not adequate where they merely parrot the statutory language without any supporting statement of the underlying facts. 46/ One of the most significant recent administrative law developments has been the judicial tendency to convert the findings requirement into one of reasoned decisions--at least in certain cases. Thus, where an agency changes its policy or interpretation or refuses to follow its precedents, the cases hold that it must supply a reasoned analysis to support the change. 47/ A D.C. Circuit case goes further and rules that an agency must give reasons for its refusal to issue declaratory orders. While agencies have discretion to deny declaratory relief, their denial may not be affirmed in the complete absence of an explanation for that denial. 48/

45/ Salling v. Benson, 641 F.Supp. 1046, 1054, 1067 (W.D. Va. 1986).

On agency review of ALJs see Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986); Heifetz v. Dep't., 475 S.2d 1277 (Fla. App. 1985).

On counsel see Trench v. INS, 783 F.2d 181 (10th Cir. 1986) (no right to appointed counsel).

46/ Texas Health Facilities Comm'n v. Presbyterian Hosp., 690 S.W.2d 564 (Tex. 1985). See Illinois Commerce Comm'n v. ICC, 787 F.2d 616 (D.C. Cir. 1986).

47/ NRDC v. EPA, 790 F.2d 289 (3d Cir. 1986); International Alliance v. NLRB, 779 F.2d 552 (9th Cir. 1985); National Audubon Soc. v. Hester, 627 F.Supp. 1419 (D.C. 1986).

48/ Yakima Valley Cablevision v. FCC, 794 F.2d 737 (D.C.

The next step will undoubtedly be a more general requirement of reasoned administrative decisions. Indeed, according to Judge Posner, "there is considerable authority that due process of law requires that the nonjudicial decisionmaker--the agency or its hearing officer as distinct from a judge or a jury--'should state the reasons for his determination and indicate the evidence he relied on.'" He explains the requirement as a "back-up safeguard, designed to make sure, so far as it is possible to do so, that the hearing which due process requires is a meaningful one, as it would not be if the decisionmaker based his decision on materials outside of the record that was compiled at the hearing, other than such extra-record materials as the agency could properly take official notice of." 49/

Cir. 1986).

49/ Hamertman v. Chicago, 776 F.2d 636, 645 (7th Cir. 1985).