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Administrative Law—Tendency of Court to Modify Administrative Punishment

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It interprets the statute as requiring the Administrator to regard all relevant and nonrefuted objective facts and to hold hearings and make inquiries when warranted by the facts in light of the standards of Section 4 before reaching his determination. This decision cannot be interpreted as requiring a standard for determination different from one resting on sound considerations in fact and law,[43] or one, substantially supported by the evidence.[44]

TENDENCY OF COURT TO MODIFY ADMINISTRATIVE PUNISHMENT

The petitioner, an employee of the New York City Transit Authority for over twenty years, was charged by the Authority with stealing several fares. After a hearing before the Authority, in which she was represented by counsel and testified in her own behalf, the hearing officer sustained the charges. Upon her dismissal by the Authority, she brought an Article 78[45] proceeding to have this determination reviewed by the courts. The Appellate Division[46] modified the discipline from outright dismissal to a six month suspension. The Court of Appeals, in *Mitthauer v. Patterson*,[47] by a 5-2 decision, affirmed the Appellate Division.

> Section 1296 of the Civil Practice Act provides: "In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only:
> 5-(a). Whether the respondent abused his discretion in imposing the measure of punishment or penalty or discipline involved in the determination."

There is little or no doubting the fact that subdivision 5-(a) was added in 1955 to overrule cases which held that no judicial review could be had of the measure of punishment imposed by administrative agencies acting within their powers.[48]

The first issue faced by the Court of Appeals was whether subdivision 5-(a) should apply at all to this case. In 1957 this subdivision had been interpreted by the Appellate Division in *Stolz v. Board of Regents* as follows: " . . . the statute authorizes us to set aside a determination by an administrative agency, only if the measure of punishment or discipline is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness."[49] The Transit Authority argued that the dismissal of an employee who has stolen her employer's property does not shock anyone, and that the Appellate Division abused its discretion in mitigating the punishment. The Court of Appeals agreed that the evidence supported the finding of guilt and

43. Supra note 38.
44. Supra note 39.
45. N.Y. Civ. Prac. Act Article 78 is entitled "Proceeding Against A Body Or Officer" and sets forth the procedure under which the actions of a governmental agency can be reviewed by the courts.
46. 8 A.D.2d 953, 190 N.Y.S.2d 431 (2d Dep't 1959).
47. 8 N.Y.2d 37, 201 N.Y.S.2d 321 (1960).
48. See Barsky v. Board of Regents, 305 N.Y. 89, 111 N.E.2d 222 (1953).
49. 4 A.D.2d 361, 364, 165 N.Y.S.2d 179, 182 (3d Dep't 1957).

that in view of such a finding, dismissal would not seem to be a shocking penalty. Yet, despite the *Stolz* decision, the Authority's admittedly persuasive argument,[50] and its own agreement with the findings and disposition of the case by the Authority, the Court of Appeals held that because of this employee's long service with the Authority and the loss of benefits which she would incur, Section 1296(5)-(a) was correctly applied. If this holding is not a tacit overruling of the *Stolz* decision, this holding does lack clarity of reason and tends to prefer sentimentality above maintaining honesty among employees.

Having determined that this was a proper case for the application of 1296(5)-(a), the second issue which the Court had to face was whether this subdivision authorizes a reviewing court to fix a new penalty or whether the most such court can do is to remand the case to the agency to fix a new penalty. Finding no precedent on this problem, the Court held that 5-(a) did give reviewing courts the authority to impose new penalties. The principal reason which the Court of Appeals gave for this holding was the avoidance of "circumlocution." That is, rather than send the case back to the Authority for the imposition of a new penalty, it would be more efficient to give the courts the power to do so. It appears, however, that "circumlocution" could also be avoided if the *Stolz* rule were continually applied, thus never bringing cases such as this before the courts in the first place. In any case, it is difficult to find any basis for this holding in the language of Section 1296(5)-(a), "circumlocution" notwithstanding.[51]

The final issue faced by the Court of Appeals was Section 75(3) of the Civil Service Law. This Section provides that the punishment of civil service employees (which this employee was), who are found guilty of the charges levied against them, may consist of ". . . a reprimand, a fine not to exceed one hundred dollars . . . suspension without pay for a period not exceeding two months, demotion . . . , or dismissal from the service." A six month suspension is not included in this list. However, the majority interpreted this statute as being suggestive, not exclusive, and held that the circumstances of this case plus Section 1296 5-(a) make a six month sentence a legal penalty.

On each of the three issues, the two dissenting Justices took an opposite position. It was their contention that Section 1296(5)-(a) only gave the courts the authority to determine whether an agency had abused its discretion in the imposition of punishment, and not to fix new penalties, and that in this case, the Authority had not abused its discretion in discharging a proven thief. In addition, the dissent interpreted Section 75(3) of the Civil Service Law as being exclusive, and therefore even if the courts could impose new penalties, a six month suspension was unauthorized by any statute.

50. The Court said, "This argument by the Authority is a little hard to answer." Supra note 47 at 39, 201 N.Y.S.2d 323 (1960).

51. The Court suggests that pp. 32-35 of the 1955 N.Y. State Legislative Annual provides some basis for a finding that authority to fix new penalties does exist. These pages are of little assistance.

This was basically a case of statutory interpretation with little or no precedent for guidance. While there is something to be said for both positions, it does appear difficult to find language in any of the statutes in question which firmly supports the majority's position. In other words, the majority seems to have created for the courts a type of authority not fully contemplated by these statutes. Furthermore, if one is concerned with the day to day maintenance of discipline and honesty among the employees of governmental agencies, as well as with preventing unnecessary cases from increasing the already heavy work load of the courts, the position of the dissenters seems preferable.

In order to curtail the corrupt practices existing among longshoremen in the Port of New York, The Waterfront Commission Act of 1953 was passed requiring the registration of longshoremen with the Waterfront Commission. As amended in 1957, the act required the listing of all longshoremen eligible to be employed as checkers, and further required that checkers must possess good character and integrity.

The Brennan Brothers applied to this Commission for inclusion in the register as checkers. The Commission issued temporary checker registration to them pending final decision on their applications. After a hearing in which it was decided that the Brennan brothers did not possess the requisite good character, the Commission denied the Brennans' applications to be included in the register as checkers and revoked their temporary registration as checkers.

On appeal, in *Brennan v. Rubino*, the Appellate Division interpreted the Commission's order as precluding the Brennans forever from seeking registration as checkers and thus as excessive punishment.[52] Therefore, the Appellate Division modified the commission's order by adding to it the express permission that the Brennans may reapply for inclusion in the register as checkers.

On appeal from this modification of the Commission's order by the Appellate Division, the Court of Appeals reversed the Appellate Division's modification and reinstated the Commission's order,[52a] on the grounds that the Appellate Division misinterpreted the Commission's order and also the statute from which the Commission derives its power.[53] The Commission's order did two things: (1) denied the applications to be included in the register as checkers, and (2) revoked their temporary registration as checkers. It did not allude to future applications. Furthermore, the statute expressly limits the power of the Commission in cases of application for registration to "the granting or denial thereof." Therefore, the Appellate Division's modification of the Commission's order is superfluous. As such it is an unwarranted usurpation of power by the judiciary over the decision-making (capacity) of an administrative agency.

52. 8 A.D.2d 629, 185 N.Y.S.2d (2d Dep't 1959).
52a. 8 N.Y.2d 16, 200 N.Y.S.2d 633 (1960).
53. Waterfront Commission Act, part 1, art. XI(6).

This case illustrates the problem of the balance of power between the judiciary and administrative agencies. Judicial review of a commission's order, which is arbitrary and capricious, is desirable; but there is always the danger that, the judiciary, as the final arbiter, may usurp the power which the Legislature intended should belong to the administrative agencies. Prior to the enactment of subdivision 5-(a) of Section 1296 of the Civil Practice Act, the measure of punishment imposed by an administrative agency was not subject to judicial review.[54] After the passage of subdivision 5-(a) a reviewing court is empowered to determine whether a commission has abused its discretion in the measure of punishment imposed. In *In re Stolz*,[55] the Court observed that subdivision 5-(a) does not mean that the courts should substitute their judgment for that of the administrative agency. Rather the court should proceed with caution and only when the punishment is shockingly disproportionate to the offense, should the judicial body assume control. The effect of the decision of the Court of Appeals is to contain the judicial power within its proper sphere. Judicial review of a determination of an administrative agency should be sparingly used and only used in cases of gross injustice.

The Court of Appeals alludes to another possible usurpation of control by the judiciary. After the Commission has denied an application for registration, the Commission's regulations provide that future application requires "leave of the commission for good reason shown."[56] If it was the intent of the Appellate Division by its modification to circumvent this requirement, it is an unjustified interference with the discretionary power of the Commission. The goal which should be sought is a modicum of judicial review over the broad powers of an administrative agency.

Only a month after *Brennan v. Rubino* was decided, the Court of Appeals reached a decision in *Mitthauer v. Patterson*[57] which appears to be contradictory to the *Brennan* decision. Both cases involve the problem of judicial review conferred on the courts by subdivision 5-(a) of Section 1296 of the Civil Practice Act. In the *Mitthauer* case, the New York City Transit Authority dismissed a railroad clerk after finding her guilty of collecting fares without registering them. The Appellate Division modified the authority's determination by reducing the punishment from dismissal to suspension for six months on the grounds that the punishment was excessive.[58] The Court of Appeals upheld the Appellate Division's modification.

The fact that the Court of Appeals in the *Mitthauer* case arrived at an opposite conclusion regarding the propriety of the Appellate Division's modification than it did in the *Brennan* case must be attributed to the merits of the

54. In re Barsky v. Board of Regents, 305 N.Y. 89, 111 N.E.2d 222 (1953).
55. 4 A.D.2d 361, 165 N.Y.S.2d 179 (3d Dep't 1957).
56. Section 1.13 of Commission's Regulations: 12th Off. Supp. 1959, 1106, N.Y. Off. Comp. of Codes, Rules & Regulations.
57. 8 N.Y.2d 37, 201 N.Y.S.2d 321 (1960).
58. 8 A.D.2d 953, 190 N.Y.S.2d 431 (1959).

individual cases. The Court of Appeals did not decide, in the *Brennan* case, that the Appellate Division could not declare the punishment excessive, but only that the merits of the case did not demand a modification of the punishment. However in the *Mitthauer* case the Court of Appeals does decide that the merits warrant a modification of the punishment.

The decision of the *Mitthauer* case that the Authority's determination amounted to excessive punishment, is questionable. Dismissing a railroad clerk found guilty of collecting fares without registering them is not such arbitrary or excessive punishment as to warrant judicial intervention. The Authority's determination did not create a situation of gross injustice.

The most important and revolutionary aspect of the *Mitthauer* case is a question not present in the *Brennan* case, once the court has determined the punishment excessive, does the court have the power to impose a new penalty or must the court leave the imposition of a lesser penalty to the administrative agency? The Court of Appeals held that subdivision 5-(a) of Section 1296 of the Civil Practice Act does confer upon the reviewing court the power to also determine the appropriate punishment.

This holding has the valuable effect of saving time and effort by permitting a conclusive decision on all aspects of the case. However, this may mean that expediency is placed above a balance of power between the courts and administrative agencies. By this ruling the power to determine punishment is taken away from the authority and given to the court. It had been the habit for reviewing courts in similar situations to remit the case to the administrative board to determine the new penalty. The dissent argues that the holding is based on a questionable interpretation of subdivision 5-(a), and that the court's power is only to determine whether there has been an abuse of discretion.

The *Mitthauer* case, although it can be reconciled with the *Brennan* case, sets a new direction in the law by conferring on the courts a greater degree of power than has previously been exercised.

ARBITRATION

Employee Not "Party" to Collective Bargaining Agreement

New York Civil Practice Act Section 1462 provides for the vacating of an arbitration award "upon application of any *party* to the controversy which was arbitrated: . . . (3) Where the arbitrators were guilty . . . of any other misbehavior by which the rights of any party have been prejudiced . . ." (emphasis supplied).[1]

1. N.Y. Civ. Prac. Act § 1462:
In either of the following cases the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated . . . (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced . . . .