Buffalo Law Review

Volume 4 | Number 1 Article 13

10-1-1954

Administrative Law—Scope of Review

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this connection to the Federal act which had controlled up to April 30, 1950. Judge Conway, with whom Judge Van Voorhis concurred, dissented, pointing out that the Legislature had declared that its intent in passing this statute was to control those same accommodations which had been governed by the Federal law.[57] It was also pointed out that the purpose in exempting converted housing accommodations from rent control in both the State and Federal acts was to encourage such conversions to alleviate the housing shortage; but that the Federal act manifested an intention to exempt only those accommodations which constituted self-contained family units,[58] and that decontrolling units under the State act which do not meet these standards is a violation of the Legislature's expressed intent to keep under control those accommodations which were controlled by the Federal act.

It would seem that the exactly literal reading of the State control statute has resulted in a frustration of the intent of the Legislature to afford a smooth changeover from Federal to State control. A reading of the statute *in pari materia* with that which it is designed to succeed would seem the more warranted procedure.

Scope of Review

a. Forms of review: Under C.P.A., Article 78, the classifications and forms of the writs of certiorari to review, mandamus and prohibition have been abolished.[59] However, in adjudicating relief in Article 78 proceedings, these forms are still relevant in determining the type of relief to be granted.[60]

In *Gimprich v. Board of Education of City of New York,*[61] a schoolteacher brought an Article 78 proceeding in the nature of mandamus to compel the respondent to grant her two years' salary credit for outside teaching experience. The petitioner would be entitled to relief in the nature of a writ of mandamus if the respondent was under a statutory duty to grant such relief.[62] However, such relief will not be granted if the respondent is vested with an exercise of discretion.[63]

57. McK. Unconsol. Laws § 8594(1).
58. 50 U. S. C. A. § 1892(c) (3).
59. C. P. A. § 1283.
60. *Newbrand v. City of Yonkers,* 285 N. Y. 164, 33 N. E. 2d 75 (1941).
61. 306 N. Y. 401, 118 N. E. 2d 578 (1954).
62. *Strum v. Board of Education of City of New York,* 301 N. Y. 803, 96 N. E. 2d 192 (1950), *Wakefield v. Board of Education of City of New York,* 192 Misc. 639, 79 N. Y. S. 2d 420 (Sup. Ct. 1948), *modified* 274 App. Div. 884, 84 N. Y. S. 2d 700 (1st Dep't 1948), *aff'd* 299 N. Y. 664, 87 N. E. 2d 58 (1949).
63. *People ex rel. Hammond v. Leonard,* 74 N. Y. 443 (1878), *Hanson v. Teacher's Retirement Board,* 236 App. Div. 589, 260 N. Y. Supp. 481 (1st Dep't 1932), *aff'd* 262 N. Y. 496, 188 N. E. 36 (1933).

In view of the words of the applicable by-law that the "Board of Examiners shall . . . evaluate the outside experience of such appointee . . . as the equivalent of a certain number of years of experience in teaching . . ." in New York City public schools, it was held that a discretion existed in the Board to grant or refuse to grant salary credit depending upon its evaluation of whether the outside experience is the type for which credit should be given. Chief Judge Lewis dissented, feeling that the by-law directed the Board to grant salary credit in cases where appointees had outside teaching experience and had no discretion to deny such credit where outside experience of the type indicated in fact existed.

b. Non-reviewable action: Not all proceedings against bodies or officers are brought under C.P.A. Article 78. For example, a body or officer acting on behalf of a municipal corporation is subject to suit for illegal acts under § 51 of the General Municipal Law. But it is necessary under this section not only that the act complained of be illegal; it must be an illegal act threatening harm to the public interest.[64] Hence if such an allegation is not made, the action must fail unless there is demonstrated a complete lack of power in the board or officer to undertake the acts complained of.[65]

In *Kaskel v. Impellitteri*,[66] petitioner brought an action under § 51 for a determination that city officials and agencies acted improperly in acquiring realty for slum clearance. No allegation of fraud or misconduct was made, petitioner relying on a claim that the area of realty in question was not in fact "substandard and insanitary" as required by statute.[67] The majority of the Court of Appeals, speaking through Judge Desmond, held that this was not a justiciable issue, that the Legislature had given to the municipal officials alone the complete power to determine whether or not an area was in fact "substandard and insanitary" and this determination could not be reviewed by the courts without effecting a transfer of power from the designated agencies to the courts. Judges Van Voorhis and Fuld, dissenting, maintained that the petitioner had made sufficient allegations to bring into question the fact of whether or not the agency determination was to result in a purpose authorized by statute, i. e., slum clearance and rehabilitation authorized by § 71-k of the General Municipal Law, or a purpose not authorized by statute, i. e., building a coliseum on the site; hence they concluded that the action should go to a trial

64. *Altschul v. Ludwig*, 216 N.Y. 459, 111 N.E. 216 (1916).
65. *Ibid.*
66. 306 N. Y. 73, 115 N. E. 2d 659 (1953).
67. GENERAL MUNICIPAL LAW § 72-k(1).

on the merits rather than be decided on a motion to dismiss the complaint.

c. Presumption of regularity. The familiar rule that administrative proceedings will be accorded a presumption of regularity applies also in the case of a municipal legislature acting as a board of reapportionment, and the burden of proving a reapportionment has been unconstitutionally made rests on those making such assertion.[68]

The State Constitution provides that, in the case of counties entitled to more than one State Senator, the counties shall be divided into districts as nearly equal in number of inhabitants and "of convenient and contiguous territory in as compact form" as is possible and practicable.[69] The reapportionment of several districts in Kings County was challenged as violative of this provision In re *Richardson.*[70] The majority of the court, *per* Chief Judge Lewis, held that, although the districts challenged had highly irregular boundaries, there was no showing that the respondents had acted arbitrarily and for political considerations. The difficulty of making divisions that satisfied both requirements of being equal in population and compact and contiguous in territory was pointed out. Judge Fuld dissented as to all the districts involved, and Judge Van Voorhis as to three on the ground that the extreme irregularity of the districts *prima facie* violated the Constitutional mandate. It was pointed out that the districts were much more irregular than those found invalidly drawn in the *Sherrill* case.[71]

d. Conclusions of fact. Conclusions of fact made by an administrative tribunal, if supported by substantial evidence, cannot be disturbed by the courts.[72] In *Ralph v. Board of Estimate of City of New York,*[73] the claimant's husband was struck by a car and killed shortly after leaving a camera shop where he had been inquiring about a camera which was being specially constructed for use in microfilming documents in the bureau of which the decedent was head. He had left his office for the day and stopped at the shop on his way home. If decedent's death occurred as a "natural and proximate result of an accident sustained while a

68. *Matter of Sherrill v. O'Brien,* 188 N. Y. 185, 196-199, 81 N. E. 124, 127-128 (1907), *Matter of Fay,* 291 N. Y. 198, 206-207, 52 N. E. 2d 97, 98 (1943).

69. N. Y. CONST. Art. 3, § 5.

70. 307 N. Y. 269, 121 N. E. 2d 217 (1954).

71. See note 68 *supra.*

72. *Consolidated Edison Co., et al. v. National Labor Relations Board,* 305 U. S. 197 (1938), *Stork Restaurant, Inc. v. Boland, et al.,* 282 N. Y. 256, 26 N. E. 2d 247 (1940), C. P. A. § 1296(6).

73. 306 N. Y. 447, 119 N. E. 2d 37 (1954).

member and while in the performance of duty at some definite time and place,'"[74] his widow would be entitled to an accidental death pension equal to one half his final compensation rather than an ordinary death benefit from the employees' retirement fund. On the above facts the Board of Estimate found that the claimant had not carried the burden of proving that decedent had been killed while in performance of his duties. Special Term reversed this and granted the award, but the Appellate Division reversed and reinstated the decision of the Board.[75] The majority of the court, *per* Chief Judge Lewis, held that there was no evidentiary basis for the inference implicit in the Board's finding, that since petitioner had left his place of employment and was killed on the way home he was no longer engaged in the duties of his employment. Judges Desmond and Van Voorhis were of the opinion that the claimant had not proved that the decedent was killed in the pursuit of his employment. They would read the statute strictly as requiring that the decedent die at the time and in the place of employment.

In *Holland v. Edwards*,[76] the State Commission Against Discrimination Law[77] came for the first time to the Court of Appeals. Under that law, the State Commission Against Discrimination is empowered to entertain complaints by aggrieved persons that discriminatory practices are being employed, hold hearings and subpoena witnesses, make findings of fact, and, if it should find that discriminatory practices are involved, issue a cease and desist order.[78] Judicial review of the Commission's orders may be obtained by aggrieved persons but findings of fact made by the Commission are conclusive "if supported by sufficient evidence on the record considered as a whole."[79]

The court held that it was reasonable for the Commission to conclude that the inquiries made by the employment agency violated the anti-discriminatory provisions even though the same inquiries under different circumstances might not constitute such a practice. It was also held that the Commission had wide discretion in its choice of remedies in implementing the statute with which the courts could interfere only if the remedy selected had no reasonable relation to the practice found to exist.

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74. NEW YORK CITY ADMINISTRATIVE CODE § B3-33.0.
75. *Ralph v. Board of Estimate of New York City et al.*, 280 App. Div. 942, 116 N. Y. S. 2d 29 (2d Dep't 1952).
76. 307 N. Y. 38, 119 N. E. 2d 581 (1954).
77. EXECUTIVE LAW Art. 15.
78. *Id.* § 297.
79. *Id.* § 298.

e. *Conclusions of law:* In *Golden v. Joseph,*[80] city employees under the civil service designation of "stationary firemen" brought an action under § 220 of the Labor Law demanding fixation of their wages at the prevailing rate under that section. The New York City Comptroller dismissed the petitions on the ground that petitioners' employment was not such as to bring them within the statutory definition of laborers, workmen or mechanics employed in the construction, maintenance or repair of public works.[81] The Appellate Division affirmed.[82]

The Court of Appeals, *per* Judge Desmond, unanimously reversed this determination on the ground that it was error to exclude evidence that these employees actually did make repairs on buildings though their classification did not specifically call for it, and hence, since they did in fact make such repairs, they did have a right to a wage fixation under §220. It is true that the test of whether or not a city employee is engaged in construction, maintenance or repair of public works is the municipal civil service description of his job duties,[83] but the designation of "stationary firemen" encompassed such work as was embraced by the statute. The Comptroller, in finding otherwise, had hence misconstrued the statute.

II. Business Associations

Corporations

a. *Right of appraisal:* Section 21 of the Stock Corporation Law provides procedures for the determination of the value of the stock of a stockholder objecting properly to various kinds of action by the corporation.[1] The corporation may make an offer to purchase the objector's stock. If it does not do so, or the stockholder fails to accept the offer, the stockholder of the corporation may petition the Supreme Court to determine the value. "Such petition shall be made returnable on the fiftieth day after the last day on which the demand of the objecting stockholder for payment might have been made . . ." Certain recapitalizations[2] are subject to

80. 307 N. Y. 62, 120 N. E. 2d 162 (1954).
81. Labor Law § 220(2).
82. *Golden v. Joseph,* 281 App. Div. 655, 117 N.Y.S. 2d 653 (1st Dep't 1952).
83. *Flannery v. Joseph,* 300 N.Y. 149, 89 N.E. 2d 869 (1949).

1. A right of appraisal arises under Stock Corporation Law § 14 (issue of stock to employees in derogation of preemptive rights); § 20 (sale of assets); § 85 (merger); § 91 (consolidation); Art. 4, especially § 38(11) (amendment of certificate of incorporation); § 105 (dissolution).
2. Stock Corporation Law § 38(11).