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Chapter 24: Administrative Law

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CHAPTER 24

Administrative Law

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A. THE ADMINISTRATIVE PROCEDURE ACT

§24.1. General. In the not too distant future, it should be possible to comment on current developments in the field of administrative law without drawing a sharp distinction between the State Administrative Procedure Act and other developments. Decisions under the APA will become integrated with the general body of decisional law—as is largely true under the federal act. For present purposes, however, this topical division continues to be useful.

Although the APA has been in effect for about two and one-half years, very few cases involving its interpretation have been before the Supreme Judicial Court. Prior to the present survey year there were none, and during the year there have been but three. This dearth of cases is easily explained. The act became effective on July 1, 1955, but its provisions relating to agency procedure were not to be applied to any proceeding then pending in an agency. As a result, many of the cases under review thus far have been governed by the prior law, but an increase in the number of cases decided under the act can be expected in the next few years.

§24.2. Petitions for judicial review under the act. APA §14 provides a new judicial review procedure, initiated by a petition for review, for all persons aggrieved by final decisions of administrative agencies in "adjudicatory proceedings." This review procedure is to be utilized not only where no other statutory form of judicial review is provided but also "where the only statutory form of review is by extraordinary writ." Clearly it is intended that the APA review procedure replace certiorari and mandamus but the replacement is not total; there remain situations to which the APA review will not

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§24.1. 1 G.L., c. 30A, hereinafter referred to as "APA."

extend, as for example where "adjudicatory proceedings" are not involved or the decision is not final.

The APA might better have provided a statutory mode of review to replace all review by extraordinary writ. Indeed, the administrative procedure bill as first introduced contained such a provision. This was deleted for further study and never enacted. As the act now stands, counsel seeking review of state administrative action must consider carefully which mode of review is appropriate. Ordinarily this will not be a difficult decision. Frequently the answer will turn on whether the proceeding was "adjudicatory," as was true in two cases decided during the 1957 Survey year.

In Hayeck v. Metropolitan District Commission, the petitioners applied to the Commission for permission to construct a rear driveway from their parcel of land to a road located within the jurisdiction of the Commission. The Commission denied the application and petitioners then requested and were granted a public hearing. After the hearing the Commission refused to reverse its earlier action. The petitioners thereupon filed in the Superior Court a petition to review the Commission's action, purportedly under APA §14. The respondents demurred on the ground that this avenue of review was not available.

The reasoning of the Supreme Judicial Court was as follows: Under APA §1, the proceeding was not "adjudicatory" unless the petitioners were entitled either by statute or by constitutional right to a hearing. It was undisputed that there was no statute providing for a hearing. Thus, unless petitioners were constitutionally entitled to a hearing, they were not entitled to judicial review under the act. It was not clear that petitioners had any pre-existing claim to access to the road. If they did, however, and if the Commission's decision amounted to a "taking" of that claim, they could recover just compensation. They were not entitled to a hearing on the issue whether a "taking" should be made.

The Court's reasoning and conclusion appear entirely sound. Its analysis of the act, on the basis of which it viewed the constitutional issue as crucial, is indisputable. And the determination that petitioners had failed to make out a constitutional right to a hearing was in accord with well-established doctrine. Indeed, in light of the insubstantiality of petitioner's property interest and the likelihood that the issues were primarily managerial in nature, one can understand the absence of a statutory provision for hearing.

The Commission's power may give cause for concern over potential abuse. For example, the Commission might unfairly discriminate against petitioners and in favor of other persons similarly situated.

2 The principal reason for the deletion was that the proposal extended to judicial review of local administrative action. It was felt that such extension deserved further study. For the details, see 1954 Ann. Surv. Mass. Law §14.28; 1955 Ann. Surv. Mass. Law §13.1.

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Provision for a hearing would reduce this possibility. On the other hand, a hearing requirement is not the sole check available. Petitioners may, even after the decision in the principal case, seek a writ of mandamus⁴ and it should be open to them in that proceeding to show, if they can, that the Commission has been discriminatory. In fact, of course, no such showing was even intimated and the Court by way of dictum indicated that, even had it afforded petitioners review, they should have lost on the merits.

The case of Mathewson v. Contributory Retirement Appeal Board⁵ presented the very same problem in reverse. Review was sought of a denial of a disability pension, through a petition for certiorari. The Supreme Judicial Court held that the petition must be dismissed since the APA provided the exclusive mode of review now available. The applicable statutes provided that the appeal board must afford a hearing; thus it had rendered a final decision in an adjudicatory proceeding.

The Attorney General had offered to waive the procedural point. The Court refused to accept the waiver; the review requirements were apparently viewed as "jurisdictional" and the petition dismissed. On the other hand, the Court was not content to limit itself to a holding on the issue of procedure. It proceeded to the merits and, in a deliberate and fully considered dictum, it declared the administrative action to be in error. The agency was expected to revise its action accordingly.

One may welcome the willingness of the Court to ignore technicality, especially at a time when the effects of the APA are not yet well known to the bar. But a lawyer would surely be very foolish to rely on the Court's continuing this practice in all future cases.

§24.3. Renewal of license: Right to a hearing. APA §13 provides that, in the absence of any statute to the contrary, an agency must afford a hearing before it may revoke or refuse to renew a license. Moreover, if the licensee makes "timely and sufficient" application for renewal, his license does not expire until the agency acts on it. On the one hand, the agency cannot bring about the termination of a license merely by delay; on the other, a licensee must give the agency time to act on his renewal.

In Zelman v. Alcoholic Beverages Control Commission¹ a liquor licensee had become bankrupt and the trustee in bankruptcy took over the business. The relevant statutes provided for annual licenses expiring on December 31 and added that any licensee applying in November for a renewal would be "prima facie entitled" to it. The trustee in bankruptcy filed his application for a 1956 license in December, 1955. The Commission denied the renewal on the ground that it had no authority to grant a license to a trustee of a bankrupt  

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¹ 335 Mass. 515, 140 N.E.2d 467 (1957).
The trustee filed petitions for certiorari and mandamus, to which the lower court sustained demurrers. The Supreme Judicial Court ordered the cases dismissed as moot. It noted that the issue of a 1956 license was being presented in 1957. If the trustee had made his application in November, 1955, then his license would not have expired until final determination of the issues and a favorable Court ruling on the merits would "prima facie entitle" him to a 1957 license renewal. Since he applied late in 1955, however, he lost all renewal rights and must be treated just as though he were a "first time applicant." Under these circumstances, a favorable Court ruling could not give him "prima facie" rights for 1957.

While this reasoning was derived primarily from the liquor statute, the Court's opinion drew support from APA §13, especially its provision concerning "timely and sufficient" application for renewal. To the contention that the trustee's December application was timely within the meaning of §13, the Court responded that what is "timely and sufficient" must be determined by reference to the liquor laws.

The disturbing feature of the Court's opinion lies in the negative inferences it draws from the affirmative statutory language. The APA is only incidentally involved. It is true, as the Court reasoned, 'that the meaning of "timely and sufficient" application should be decided by reference to the liquor laws, as must also the distinction between a renewal of an existing license and application for a new license. Nevertheless, it seems doubtful, under those laws, that a December renewal application should for all purposes be treated as a brand new application. Neither the liquor law nor APA §13 so provides. The December applicant does lose his prima facie status and his right to insist upon early agency action. But should he, for example, also lose all right to a hearing where the agency bases its action on his alleged misconduct? He may well have held a license for twenty previous years. The Court's view seems to draw unduly harsh consequences from the tardiness of the renewal application. It is doubtful that the agency would treat tardy renewal applicants as identical with new ones, at least where the old license had not yet expired.

Because of its finding of mootness, the Court found it unnecessary to decide whether a petition for certiorari or for mandamus was a permissible mode of review. In terms of the Court's analysis treating the petitioner as a new applicant, he seems to have had no statutory or constitutional right to a hearing. On this basis, the proceeding was not adjudicatory and the extraordinary writs were properly invoked. But on the view petitioner took, he was seeking renewal and was entitled to a hearing. Thus, a petition to review under APA §14 would have been more consistent with his contentions. This is an unfortunate situation in which the proper mode of review depends to some extent on one's view of the merits of the controversy.

§24.4. Relationship of the Administrative Procedure Act to subsequent legislation. The APA was drafted in such fashion that it
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could be fitted into the existing body of variegated laws governing administrative agencies. In very few instances does it override and repeal existing law in order to achieve absolute uniformity. It is generally operative only in the absence of other law to the contrary. Thus in order to determine what procedure is to be followed by a given agency, one must today look at two statutes: the agency's own statute and the APA.

This relationship has consequences for the draftsman of new legislation. An excellent example of the kind of problem that may be met arose this past year in relation to the State Ballot Law Commission. The Commission must resolve disputes "pertaining to certificates of nomination or nomination papers . . . or to withdrawals of nomination." Before passage of the APA, its decisions were reviewed by the use of extraordinary writs. It was foreseen, however, that since the Commission's decisions must be based on a hearing, its decisions would now be subject to review under the APA. While the Mathewson decision had not yet been handed down, there were probably Superior Court decisions to this effect.

Apparently the Commission was content with the change in mode of review except for one difficulty. Unless the Commission's decisions could be reviewed quickly, the electoral process might bog down. It therefore appeared desirable to shorten the thirty-day period provided for aggrieved persons to file their review petitions under the APA. In order to accomplish this objective, the draftsman felt it necessary to amend two provisions of law. First, G.L., c. 6, §32, which provides for extraordinary writs. It was foreseen, however, that since the Commission's decisions must be based on a hearing, its decisions would now be subject to review under the APA. While the Mathewson decision had not yet been handed down, there were probably Superior Court decisions to this effect.

The change in §32 was essential, of course, but the amendment of the APA was neither necessary nor desirable. What the draftsman overlooked is that §14 already contains a general clause yielding to specific review procedures contained in other statutes; only in so far as other statutes are silent do the procedures of §14 govern. But if the General Court inserts into §14 a number of specific references to other statutes, the courts may begin to attach consequences to the absence of such a reference and to ignore the general proviso of the section. This could have disastrous consequences. The specific amendment of the APA ought not to have been made.

A related but more general problem is the extent to which the APA will be held applicable to new agencies or to statutes conferring


2 G.L., c. 6, §32.


new rule-making or adjudicating powers on existing agencies. It might be argued that the APA ought to contain a clause that appears in the federal act: "No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." The Attorney General's Manual on the Federal Act, after noting that the statute cannot prevent repeal or modification by a later statute, adds: "However, the act is intended to express general standards of wide applicability. It is believed that the courts should as a rule of construction interpret the act as applicable on a broad basis, unless some subsequent act clearly provides to the contrary." It would appear that the Massachusetts statute should be interpreted in essentially the same way, notwithstanding the absence of the clause.

The general approach taken by the Supreme Judicial Court—and by most other courts as well—is expressed in a dictum, as follows:

Statutes framed in general terms commonly look to the future and may include conditions as they arise from time to time not even known at the time of enactment, provided they are fairly within the sweep and the meaning of the words and falling within their obvious scope and purpose. But statutes do not govern situations not within the reason of their enactment and giving rise to radically diverse circumstances presumably not within the dominating purpose of those who framed and enacted them.

The APA is framed in the most general terms precisely in order that it may be applicable to a wide variety of agencies and situations. The act defines "agency" in terms broad enough to include any new body set up in the executive department to issue rules and regulations or to conduct adjudicatory proceedings. And only very rarely will an agency be created "giving rise to radically diverse circumstances presumably not within the dominating purpose of those who framed and enacted" the act.

Undoubtedly, despite the flexibility of the APA, there will be cases in the future in which it is contended that some specific provision of a subsequent statute overrides the act. Here again one may question the significance of the clause contained in the federal act. If the new provision is clear and express, there can be no doubt under either federal or state law. In cases of doubt, the federal court will refer to the clause; a state court may have recourse to the traditional pre-

7 It should be added that most, if not all, other states enacting comprehensive administrative procedure acts have omitted the clause. For references to these acts, see Harris, Administrative Practice and Procedure: Comparative State Legislation, 6 Okla. L. Rev. 29 (1953). The Model State Administrative Procedure Act, adopted by the Commissioners on Uniform State Laws in 1946, likewise omits the clause.
sumption that a legislature does not repeal statutes by implication.\(^9\) Perhaps the significance of the clause in the federal act lies in its conveying a "mood."\(^10\) One can find a similar note in the interstices of the Massachusetts APA.

**B. Other Developments**

**§24.5. Delegation of powers.** In Connolly v. Alcoholic Beverages Control Commission,\(^1\) a registered pharmacist sought by certiorari and mandamus to upset the denial by the Commission of his application for a liquor license. One of his contentions was that the statute represented an unconstitutional delegation of legislative power, in that it failed to set up adequate standards for the Commission's action. The relevant provision was that no license could be granted "except to an applicant approved by the commission."\(^2\)

The Supreme Judicial Court rejected the contention, giving two reasons. First, it suggested that the power to delegate was broader in this area than in others because this was "a trade, which, because of its great potential evils, can be wholly prohibited."\(^3\) Thus, the license represented only a "special privilege." Secondly, the Court found that the statutory scheme set forth, by implication if not expressly, the policies and standards to be observed in the administration of the law.

The first reason finds support in tradition but one may question its soundness. The delegation of power to license is more than a delegation to legislate; it contains important elements of adjudicatory power. It is true that at one time it was not uncommon for legislatures to issue licenses. And the power has little or no retrospective impact. In both of these respects the power may be thought of as "legislative." But it is adjudicative in the sense that it is exercised case by case, with the decision turning on individual circumstances. What is desired of the agency is fair and even-handed treatment and the courts cannot effectively review the agency's action unless there are standards by which it can be appraised. Legislative power to ban the entire trade is irrelevant; a total prohibition would operate evenly. Nor is it fully satisfying to note that a would-be bartender suffers less from a denial of license than a would-be doctor. The public interest in equal treatment deserves protection too.

**§24.6. Requirement that agency give reasons.** The Court in the

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\(^1\) 334 Mass. 613, 138 N.E.2d 131 (1956).

\(^2\) G.L., c. 138, §15.

Connolly case,1 having found standards in the liquor law which the agency must observe, went on to review the Commission's decision. It ruled that the Commission might quite properly consider not only the applicant's personal fitness, but the proximity of schools and churches, existing patronage by children of the applicant's drugstore, and the like. Taking all of these matters into account, the Commission's decision was not unreasonable in light of all the evidence before it. The Commission had granted a seemingly informal hearing and had given no reasons for its decision. The Court concluded that reasons need not be stated "however desirable such statements by administrative boards may be."2 When the legislature has wanted the Commission to give reasons, it has explicitly required them. The APA was not applicable because the Commission decision preceded the effective date of the act.

Although the agency gave no reasons, the Court's opinion suggests that the judges were nevertheless able to discern the factors underlying the decision and to determine that these factors were adequate. There will be cases, however, in which the record will not be so illuminating. There may be a real question whether the agency has observed proper standards. In such circumstances, why should the Court not have power to require that the agency give reasons? It may be granted that a statement of reasons is not always constitutionally required3 and that a silent statute should not be read to imply such a statement in every case. By the same token, statutory silence does not necessarily mean that reasons are never required. It is the Court's function to see that the agency remains within the power delegated to it. At times the Court will be unable to perform its role unless it has the agency's reasoning; in such cases the Court should be able to obtain it.

§24.7. Some aspects of hearing procedure. In Manchester v. Selectmen of Nantucket,1 the Court had before it an interesting problem relating to notice. The selectmen notified petitioner, who held an innholder's license, that a hearing was to be held concerning "complaints received" about the operation of her summer hotel. At the time of the scheduled hearing, petitioner appeared, objected that the notice was too vague and indefinite, and withdrew. The selectmen held the hearing without her and voted to suspend her license for one week. Petitioner sought certiorari.

The Supreme Judicial Court upheld the dismissal of the petition. It ruled that the notice given was inadequate but that petitioner lost this defense when she withdrew. She should have requested additional information and time to prepare a defense. Had these been denied,

2 334 Mass. at 618 n.1, 138 N.E.2d at 135 n.6.
3 See Davis, Administrative Law §167 (1951).

her objections would have been substantial. The Court's decision should have a salutary effect in future administrative proceedings not only on the officials but on the respondents as well.

Nartowicz's Case\(^2\) suggests the need to articulate the function of the hearing officer who receives evidence and hears witnesses. The case arose out of a workmen's compensation proceeding. A single member heard all of the evidence, as was usual, but before rendering a decision he died. The evidence of record was submitted to another single member, who ordered compensation. The question on appeal was whether the entire matter should have been reheard de novo.

The Supreme Judicial Court held that the proceedings were entirely proper. First it found that all of the parties had consented to the substitution of hearing officers and this alone precluded reversal. But the Court went further. It declared that the decision of the reviewing board entirely supersedes that of the single member. His function is to compile a record containing all of the relevant evidence. Since the single member's decision is insignificant, the substitution is not important.

The Court's view is in accord with many of the older cases in other jurisdictions but seems somewhat out of harmony with our present conception of the hearing officer's function.\(^3\) It may be that, for purposes of judicial review, the Court should ignore the single member's decision and ask only whether the evidence supports the reviewing board's decision.\(^4\) It does not follow that the board should act without considering the views of the man who heard the witnesses. In those cases where demeanor of witnesses is important to the determination of the facts, the board should have the single member's views precisely because the board is charged with principal responsibility. Certainly when the single member is available, his decision must be considered. And in case of death it would seem that the proceeding should be reheard by another. Of course the parties may always agree to avoid rehearing. And where demeanor is relatively unimportant a substitution of hearing officers seems entirely proper.


\(^3\) For a review of the cases, both old and new, see Davis, Administrative Law §103 (1951).

\(^4\) On the basis of the special language and history of the federal APA, the Supreme Court has rejected this view. Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 Sup. Ct. 456, 95 L. Ed. 456 (1951).