Chapter 14: Administrative Law

William I. Cowin

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Administrative Law Commons

Recommended Citation
CHAPTER 14

Administrative Law

WILLIAM 1. COWIN

§14.1. General. The 1966 Survey year was not quite so rich from an administrative law viewpoint as was the year which preceded it. However, there were some Supreme Judicial Court cases of interest. The Court concerned itself, among other things, with questions involving the promulgation of administrative regulations; the scope of agency discretion; the regulation of trade and professions; and the construction of statutes governing administrative functions. The Court appears to continue to follow the philosophy of granting the administrators quite wide discretion, electing not to interfere with the administrative process unless clear illegality or prejudice to a party can be shown. The decisions are of further interest because of the occasional revealing of some judicial testiness with regard to the functioning of one or two of the Commonwealth's better known administrative bodies.

§14.2. State Racing Commission: Statutory conditions to granting of dates. In Berkshire Downs, Inc. v. State Racing Commission, the Supreme Judicial Court justifiably refused to consider the administrative questions, preferring instead to dispose of the case on the basis of statutory construction. The Commission had been asked to act upon two "running horse" racing applications for the calendar year 1966. One, filed by Eastern Racing Association, Inc. (Suffolk Downs), asked the Commission to grant the statutory maximum of 90 racing dates. Berkshire Downs, Inc. requested only 24 racing dates. The Commission proceeded to grant Eastern the 90 dates it had requested, and dismissed the application filed by Berkshire.

Each corporation was permitted to intervene in the proceeding relating to the other's application. After the hearings were completed, the Commission reached the following conclusions:

1. The physical facilities offered by Eastern to the public are far superior to the facilities available at Berkshire. . . .

2. Eastern

WILLIAM 1. COWIN is former Assistant Attorney General of the Commonwealth and former Chief of the Administrative Division of the Attorney General's office. He is now aide to United States Senator Edward W. Brooke.

2 G.L., c. 128A, §3(f).
offers a better quality of racing. . . . 3. Eastern is more conveniently located and available to a larger number of people. . . .
4. The past history of the operation of Berkshire and Eastern indicates that Eastern will draw a much larger daily attendance resulting in increased pari-mutuel handle with a resultant increase in revenue to the Commonwealth. 5. The losses as shown on the Financial Statement of Berkshire for the years of 1964 and 1965 indicate that the Berkshire track lacks public acceptance. 6. The application of Berkshire Downs, Inc. is not in proper form in that it does not comply with the provisions of Section 13A of Chapter 128A of the General Laws.8

The first five conclusions were presumably based upon information elicited at the hearings; the sixth followed an opinion issued by the Attorney General to the effect that the location of the track in the town of Hancock had not properly been ratified by the registered voters of that community in accordance with General Laws, Chapter 128A, Section 13A.

Under Chapter 30A, Berkshire sought review of the order dismissing its application and the order granting the application filed by Eastern.4 A judge of the Superior Court reported the matter without decision for consideration by the Supreme Judicial Court. The Court agreed with the Attorney General that the location of the Hancock Race Track had not properly been approved under the provisions of General Laws, Chapter 128A, Section 13A. That section requires that locations to be used for racing meetings, other than those to which racing meetings were held prior to May 1, 1948, and other than those associated with state or county fairs, must be approved by the selectmen of the town in which the track is located. Such approval by the selectmen must then be ratified and confirmed by vote, taken by Australian ballot, of a majority of the registered voters of the town voting at the next annual election. Section 13A then provides that this approval “shall be effective for a period of six years at the expiration of which time the location shall again be so approved before the Commission shall grant a license for a racing meeting in said town.”

The property owned by Berkshire Downs was first approved for racing by the board of selectmen of Hancock on January 20, 1953. On February 2, 1953, a majority of the registered voters of the town of Hancock voted to ratify and confirm the approval by the selectmen of the location in question. The selectmen again considered the question of approval of the Berkshire Downs location early in 1959. Once again, the selectmen granted approval, and this approval was ratified by the voters at the town election conducted on February 2, 1959. This was the last recorded approval of the Berkshire Downs location prior to the filing of Berkshire’s application for 1966 racing dates.5

4 G.L., c. 30A, §14.
§14.2 ADMINISTRATIVE LAW

Subsequent to filing its application on January 4, 1966, Berkshire took steps to secure new approval of the site. The board of selectmen of Hancock were apparently prepared to hold a public hearing on the question of approval, and presumably to grant such approval before the end of January. However, ratification of such approval by the voters could not be obtained prior to February 8, 1966, the date of the town election. Under the provisions of General Laws, Chapter 128A, Section 2, the State Racing Commission was obliged to act upon the Berkshire application on or before January 30, 1966.

The Court rejected Berkshire's contention that ratification of the selectmen's approval was required only once, and that subsequent approvals were effective without further vote by the town. The Court noted that the statute provided that "said approval by the selectmen . . . shall not become effective unless and until it shall be ratified and confirmed . . . ."6 Citing Selectmen of Topsfield v. State Racing Commission,7 the Court quoted: "The dominant purpose of the statute was to give the registered voters in towns the right to say whether the approval of the selectmen should be ratified or rejected."8 It concluded that the statute did not contemplate the granting of a license before the registered voters of a particular town were given the opportunity to determine whether the selectmen's approval should have been granted.

The Court further concluded that the statutory requirements imposed by Section 13A as conditions to be met prior to the "granting" of a license would have to be fulfilled prior to action by the Commission upon the application. Berkshire had contended that the statutory reference to the "granting" of the licenses referred not to positive action upon the application, but rather to the formal transfer of the license itself from the Commission to the licensee. The Court quickly disposed of this position:

We believe that . . . a license is "granted" when the commission votes favorably on the application. In that event, the remaining action of the commission is the formal issuance of the license. We are of opinion that approval and ratification are required before the commission has authority to act on the application.9

General Laws, Chapter 128A, Section 2, fixes a specific date by which the Commission must act upon a racing application. The Court concluded that it was the intention of the legislature that there be a final decision as of that time. Consequently, Berkshire's contention that the State Racing Commission could issue a license conditioned upon the subsequent ratification by the voters at the February town election was rejected:

6 G.L., c. 128A, §13A (emphasis in original).
We are satisfied that the "conditions" referred to in §9 [of G.L., c. 128A] are "conditions" "under which... horse... racing meetings shall be conducted" and are not to be confused with statutory conditions which must be complied with precedent to the commission's authority to act.¹⁰

Further support for the Court's insistence that action upon the application be totally concluded on or before January 30th was developed in the argument before the full bench, but not mentioned in the opinion. It is clear that adoption of the Berkshire position that the Commission can lawfully grant a conditional license could result in substantial confusion in the awarding of racing dates in the Commonwealth. It has been the recent practice of the Commission to award all 90 dates authorized by General Laws, Chapter 128A, Section 3(f). Had the Commission awarded 24 dates to Berkshire on a conditional basis, and had the voters of the town of Hancock then refused to ratify the approval of the location given by the selectmen, the 24 dates could not be awarded to another applicant. Obviously the General Court did not contemplate removal of the ultimate decision from the hands of the Commissioners in this manner.

The Court was forced to wrestle with the confusing provisions of the statute. The Court concluded, as had the Attorney General, that the statutory provisions would result in the holding of a racing season between the date upon which a track location is approved and ratified and the date upon which the application for a license may be granted. Consequently, it is conceivable that local approval of the track location might be refused at a given election, but that the sixth racing year authorized by the earlier approval and ratification would nevertheless have to be held. The judges were satisfied that this construction "affords a workable and practical means of making the statute 'an effectual piece of legislation.'"¹¹

Having affirmed the Commission's decision on the basis of its reading of the complicated statute, the Court considered moot the questions raised by the issue of whether the Commission's findings supported its decisions and did not pass upon them.¹² Although the fact may not have been readily apparent to the Berkshire proprietors, the Court in so deciding the case very likely helped them in the long run. The Commission's conclusions to the effect that the Eastern Racing Association offered superior physical facilities, a better quality of racing, was more conveniently located, provided greater revenue for the Commonwealth, plus the conclusion that Berkshire's financial records showed that the track lacked public acceptance, would have been difficult to overturn upon a petition for judicial review. Such conclusions, supported by a judicial refusal to overturn, might well have established a precedent with respect to future applications by Berkshire. What-

¹⁰ Id. at 772, 86 N.E.2d at 432.
¹¹ Id. at 775, 86 N.E.2d at 433.
¹² Ibid.
ever its reasons, the Court chose to deal with a difficult problem of statutory construction, rather than simply to affirm the action of the Commission on the basis of its first five conclusions. As a result, Berkshire, although it has been forced to forego a season of racing, at least gets another relatively unfettered opportunity to present its claims to the agency.

§14.3. **Public schools: Discretion of school committee.** An effort by members of a school committee to force the male students within their jurisdiction to pay at least an occasional visit to the barber resulted in *Leonard v. School Committee of Attleboro,*\(^1\) certainly one of the more bizarre cases to come before the Supreme Judicial Court this term. Committee regulations governing pupil attire prohibited “extreme haircuts or any other items which are felt to be detrimental to classroom decorum.”\(^2\) This seemingly innocuous standard posed a severe professional problem to one student. To Mr. George Leonard, a young singer and instrumentalist with a wide following, who had appeared at the Newport Jazz Festival, the New York World’s Fair, and numerous other entertainment spots, the school committee’s edict represented potential professional and economic loss of no small dimension.

The situation was complicated, from a human rather than from an exclusively legal viewpoint, by the fact that George Leonard could hardly be classified as a long-haired delinquent. A studious, well-behaved, and properly attired pupil, he admittedly posed no discipline problem. He was distinguishable from any other good student by the fact that he received substantial sums of money for his musical performances and that his hair style was extraordinary for a young man in the twentieth century. Given the tastes of the young people who made up his audiences, there can be little doubt that his hair style was important to his professional success.

Thus it is possible that the school committee members were more than a little dismayed at having a test case develop in connection with this particular student. Nevertheless, pursuant to the regulation, a letter was sent to George’s parents informing them that their son would not be permitted to return to school until such time as he chose to comply with the haircut rule. George complied by not returning, but requested a hearing before the school committee. The Supreme Judicial Court described the hearing as follows:

At the outset of the hearing the plaintiff observed a pair of electric barber’s clippers which had been placed on the conference table by a member of the committee. At some stage of the proceedings a member of the committee asked the plaintiff why he did not buy “different colored wigs” in order to satisfy the school authorities. Ultimately the committee, by a divided vote, sustained the action taken by the principal and notified the plaintiff’s

---

\(^1\) 349 Mass. 704, 212 N.E.2d 468 (1966).
\(^2\) Id. at 705, 212 N.E.2d at 470.
parents to that effect. The plaintiff has not attended classes since that time.³

Following the committee's decision, George and his parents filed a bill in equity seeking to restrain the school committee, the superintendent of schools, and the principal from preventing George from attending school. A demurrer filed on behalf of the respondents was sustained by the Superior Court, and the plaintiffs appealed.⁴

At the outset, the Supreme Judicial Court disposed of the respondents' contention that General Laws, Chapter 76, Section 16, which grants recovery in tort for unlawful exclusion from school, provided an exclusive remedy in the plaintiffs' situation and thus barred the present bill in equity.

We do not believe that the Legislature intended to close the door to other appropriate remedies where admission to school, rather than damages, is sought. When one has been unlawfully deprived of that right [to attend school,] damages may often be an inadequate remedy. We apprehend that the vast majority of our young would greatly prefer an education to a monetary award for its denial.⁵

Also, the Court refused to pass upon the question whether a bill in equity was appropriate as opposed to a petition for writ of mandamus, taking refuge in the fact that the decision on the merits made the procedural determination unnecessary.⁶

The Court referred to General Laws, Chapter 71, Section 37, which provides that a school committee "... shall have general charge of all the public schools, [and] may make regulations as to attendance therein," and also referred to General Laws, Chapter 76, Section 5, to the effect that a school committee may make "reasonable regulations as to numbers . . . qualifications . . . and as to other school matters as . . . [it] shall from time to time prescribe." It was noted that these provisions have been construed broadly in favor of school committees. Accordingly, the Court accepted the principle that "a school committee may make all reasonable rules and regulations for the discipline, management, and government of the schools, and may exclude a child from school for sufficient clause."⁷ Nor was the Court willing to restrict the manner in which a given school committee, school administrator, or teacher might regulate discipline in the classroom. Dismissing the plaintiffs' contention that a school regulation must be formally adopted and publicized by the school committee before it could become effective, the Court quoted from Hodgkins v. Rockport:

³ Ibid.
⁴ Ibid.
⁵ Id. at 707, 212 N.E.2d at 471.
⁶ Id. at 705, 212 N.E.2d at 470.
⁷ Id. at 708, 212 N.E.2d at 471-472.
“Much of the power of the committee, as to the preservation of order and the maintenance of discipline, must necessarily be delegated to its different members and the teachers, and must be exercised without any vote or record.”

The Court concluded:

We hold that the principal's verbal directive, followed immediately by a letter and later by the ratification of the school committee, satisfies any procedural requirements exacted by statute or by considerations of due process.

This, of course, marked the swan song for George Leonard's current hair style, since the Court would obviously try to avoid reaching a negative decision on the substance of the school committee's action. The Court properly noted that it was not its function to pass upon the wisdom or desirability of a school regulation. "Here, accordingly, we need only perceive some rational basis for the rule requiring acceptable haircuts in order to sustain its validity." The Court accepted the agency's theory that an unusual hairstyle might tend to disrupt the decorum of the classroom and result in the distraction of other students. The fact that the plaintiff would be affected outside of the classroom, beyond the jurisdiction of the school committee, would not affect this result: "[T]he domain of family privacy must give way in so far as a regulation reasonably calculated to maintain school discipline may affect it."

Finally the Court rejected the plaintiffs' contention that the exhibiting of barber's clippers and the suggestion that the plaintiff try "different colored wigs" indicated that the hearing granted to the plaintiffs by the school committee was not conducted fairly and impartially. Noting that the incidents referred to revealed a certain lack of good taste, and that the decorum of the hearing was not to be commended, the Court nevertheless held that "these isolated incidents did not so infect the proceeding as to vitiate its validity."

The opinion represents a commendable decision by the Supreme Judicial Court to refrain from unwarranted interference with matters vested in an agency of another branch of the government. Educators, not judges, are best able to evaluate the effects of student behavior, dress, and coiffure upon the educational process, and must be permitted to do so with substantial discretion. Courts are not, in reviewing the exercise of administrative powers, ordinarily inclined to draw distinctions between elected and appointed administrators. The nonrecogni-

9 Id. at 709, 212 N.E.2d at 472.
10 Id. at 709, 212 N.E.2d at 472.
11 Id. at 710, 212 N.E.2d at 473.
12 Id. at 711, 212 N.E.2d at 473.
tion of any such distinction remains the wiser course in the large majority of situations in which the method of selection of the administrators bears little or no relation to their duties. One can note, however, that allowing somewhat greater scope to elected officials is especially rational when applied to those who, by the nature of their office, are particularly sensitive and therefore more responsive to the preferences of society. Having vested the process of selection of school committee members in the electorate, the Commonwealth can have at least partial assurance that widespread disaffection by the people of Attleboro with present official theories on the relationship of hair to the educational process would be reflected at the polls.

§14.4. Hospital reimbursement rates: Collateral attack. In Springfield Hospital v. Commissioner of Public Welfare,1 the Supreme Judicial Court resolved a problem of reimbursement to hospitals for the care of welfare patients, and also passed upon a question of administrative review procedure. A patient in the hospital was eligible for full payment of hospital costs under the "Medical Assistance for the Aged" (MAA) provisions of General Laws, Chapter 118A, Sections 13-32. The hospital submitted to the Chicopee Board of Public Welfare a bill which reflected the actual costs of the care furnished to the patient. The Chicopee board rejected the claim, asserting that payment need be made only at the all-inclusive per diem (AIPD) rate established by the Commissioner of Administration under the provisions of General Laws, Chapter 7, Section 30K. The hospital appealed to the State Department of Public Welfare in accordance with General Laws, Chapter 118A, Section 21. After the action of the Chicopee board was upheld by the Department, the hospital petitioned for judicial review of the Department's decision under General Laws, Chapter 30A, Section 14. From an order entered by the Superior Court affirming the decision of the Department, the hospital appealed to the Supreme Judicial Court.2

The hospital contended that reimbursement for the care of MAA patients (or for care provided for patients under the Aid to Families with Dependent Children program, AFDC) could not lawfully be limited to the per diem amounts established by the Commissioner of Administration. It was argued that General Laws, Chapter 7, Section 30K, related solely to care purchased by state agencies or by municipalities, and that under MAA or AFDC the actual purchase of care was made by the patient himself.

The Court disposed of this somewhat disingenuous argument by noting that the right of hospitals to be reimbursed for the care of welfare patients was statutory in nature and that nothing . . . in the Massachusetts statutes governing these special types of assistance (MAA and AFDC) . . . establishes that the Legislature intended hospital services to such aid recipients [to] be pro-

2 Id. at 777-779, 216 N.E.2d at 441-442.

http://lawdigitalcommons.bc.edu/asml/vol1966/iss1/17
vided and paid for under c. 118 and c. 118A in a manner different from the method applicable to similar services (to welfare recipients and certain others) under c. 117.\(^3\)

Accordingly, the Court ruled that the Chicopee board was justified in refusing extra payment, and affirmed the decision of the Superior Court.

In the course of the proceedings, the hospital contended that the reimbursement rates were inadequate. The Court refused to consider this contention in the present case, noting that this assertion could only be raised in a proceeding brought under the provisions of General Laws, Chapter 7, Section 30K.\(^4\) Departing somewhat from its usual solicitous feeling for hospitals, the Court noted that hospitals have a strong civic obligation to serve indigent persons without discrimination, but rather testily observed that this obligation “in some instances may be reinforced by the requirements of Federal grants.”\(^5\) The Court might also have noted that the oft-repeated threat by certain major teaching hospitals to reject all welfare patients, unless reimbursement rates for their care are immediately raised, is probably baseless, since a steady supply of welfare patients is essential to the continuation of an effective teaching program.

In any event, the Court clearly ended any aspirations which might have been entertained by the hospital that collateral attacks upon the adequacy of rates could be included in proceedings of this nature.

We decide only (a) that the remedy for any inadequacy of AIPD rates (including any constitutional relief concerning those rates) must be sought under §30K before the Commissioner of Administration, and upon review of his action under c. 30A, §7; and (b) that evidence concerning the adequacy of the AIPD rates (although appropriate in proceedings under §30K) is not relevant in proceedings before the State Department of Public Welfare under G.L., c. 118, §§ and c. 118A, §21, concerning amount payable for the care of individual aid patients, or upon review under c. 30A, §14, from the department’s decision.\(^6\)

§14.5. Occupational licenses: Substantial evidence rule. The curious operations of the administrative body involved led to the case of Milligan v. Board of Registration in Pharmacy,\(^1\) the leading administrative law case of the 1965 Survey year. Now the Supreme Judicial Court has ensured that the Pharmacy Board’s somewhat dubious reputation will remain intact for at least one more term. The

\(^3\) Id. at 781, 216 N.E.2d at 443.
\(^4\) Ibid.
\(^5\) Id. at 782 n.6, 216 N.E.2d at 444 n.6.
\(^6\) Id. at 783, 216 N.E.2d at 444.
case of Cohen v. Board of Registration in Pharmacy, decided February 9, 1966, actually began four years earlier in February of 1962. At that time, Hingham Pharmacy, a subsidiary of Parkview Drugs, Inc. (a national concern), and one Martin Cohen, a local registered pharmacist, applied under the provisions of General Laws, Chapter 112, Sections 38 and 39, for registration of a pharmacy in Hingham, and for the issuance of a permit to Cohen to operate the store.

The Board conducted a hearing in May of 1962, at which it became apparent that Hingham Pharmacy was virtually a wholly owned subsidiary of Parkview. It was further established that the proposed store was to be leased from and located within G.E.M. of Hingham, Inc. (Gem), a closed-door membership department store doing business in Massachusetts and in other states. Although Gem operated under a closed-door policy, the Hingham Pharmacy area would be open to all members of the public. The lease indicated that the drug business would be under the exclusive control of Hingham Pharmacy rather than of Gem.

The Board received in evidence a copy of a contract pursuant to which Hingham would employ Cohen as its registered pharmacist and store manager "under the direction of the Company's officers, directors, or General Manager." Although the contract was to run for two years, it further provided that it could be terminated by either party upon 30 days notice. Both Cohen and an officer of Parkview testified that Cohen would have complete professional control of the pharmacy's business, yielding to corporate officers only "in those areas wherein such control is not inconsistent with the duties and the obligations . . . [of] a registered pharmacist." The record also contained a copy of Hingham's by-laws indicating that the board of directors of Hingham was to have "general direction, management and control of the business."

The Massachusetts State Pharmaceutical Association, an organization of independent pharmacists which opposed the granting of the Hingham and Cohen applications, was allowed to intervene as a party in the proceedings before the Board. It is interesting to note that, at the time of the hearing, each of the five members of the Pharmacy Board was also a member of the Massachusetts State Pharmaceutical Association. In July, 1962, the Board rejected the applications.

The Board purportedly acted pursuant to General Laws, Chapter 112, Section 39, which provides that a corporation's application for registration may be rejected "unless it shall appear to . . . [the Board's] satisfaction . . . that the management of the drug business in such store is in the hands of a registered pharmacist." (The Board also concluded that "there is no evidence the public welfare and con-

---

3 Id. at 231, 214 N.E.2d at 64.
4 Id. at 234, 214 N.E.2d at 66.
5 Ibid.
6 See G.L., c. 30A, §10.
venience would be served by the granting of the application." The statute has been amended since the hearing in question. But at the time of the hearing it was clear that the Board lacked power to reject an application for this reason, and the Assistant Attorney General who represented the Board in this proceeding did not argue otherwise.) The Board inferred from the testimony presented to it that Cohen would be unable to exercise real control over the professional aspects of the pharmacy. This conclusion was supported, in the Board's view, primarily by the existence of the termination clause in Cohen's contract, by his limited ownership interests, and by the by-law provision which purported to vest the store's management in Hingham's board of directors and corporate officers. The Board further concluded that leases by shopping centers such as Gem normally provide for a certain degree of control of the businesses to which space is leased, thus creating additional doubt as to Cohen's professional independence.

The petitioners sought review, under General Laws, Chapter 30A, Section 14, of the Board's determination in the Superior Court. After two trips to the Supreme Judicial Court on preliminary matters, the case was finally heard by the Superior Court in January, 1965. The judge made findings upholding the Board's decision. However, prior to the entry of a final decree in the present case, the Supreme Judicial Court returned the Milligan decision. Undoubtedly influenced by the concepts embodied in Milligan, the judge made supplementary findings to the effect that the Board's decision was "unsupported by substantial evidence to warrant the conclusions upon which it was based," and that the Board drew "inferences unfavorable to the [petitioner] which are not based upon sufficient or established facts." A final decree ordered the Board to register the drugstore and to issue a permit to Cohen. The Board appealed.

The Supreme Judicial Court affirmed. Noting that the Administrative Procedure Act's definition of "substantial evidence" as "such evidence as a reasonable mind might accept as adequate to support a conclusion" hardly solved the difficulties and uncertainties of application of the concept, the Court nevertheless faced the problem squarely and ruled that the inferences drawn by the Board were neither "reasonable" nor "permissible." The Court stated:

Although the board was not bound to accept the testimony on behalf of the petitioners, or that the terms of Cohen's contract and the Gem lease are what they purport to be, the rejection of this evidence could not create substantial evidence to the contrary.

8 Id. at 235, 214 N.E.2d at 66.
9 Id. at 232, 214 N.E.2d at 65.
10 Ibid.
11 G.L., c. 30A, §1(6).
13 Ibid.
Support of the Board's decision would create in the Board the discretionary power to insist that the managing pharmacist of an incorporated pharmacy be a substantial shareholder, a corporate officer, or at least the holder of a long-term employment contract. Such policy decisions are for the legislature and not for administrative agencies. The case did not refer to possible constitutional difficulties which would arise if the legislature gave the Board powers of this type.

The Court also disposed of the "scintilla" argument that an administrative determination must be regarded as final if, even ignoring evidence to the contrary, there could be found in the record any evidence to support it.

We feel constrained to add that even if there is some evidence in this record from which a rational mind might draw the desired inference, we are not required under the substantial evidence rule as set forth in §14(8), to affirm the board's decision. Whether under prior practice an administrative determination was regarded as final if, ignoring the evidence to the contrary, there was any evidence to support it..., this is not the case under the Administrative Procedure Act. Section 14(8) of the act directs that the court's determinations are to be made "upon consideration of the entire record," and we agree with the view taken by the Supreme Court in construing a similar clause in the Federal Administrative Procedure Act, that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." ... We are of opinion that the uncontradicted testimony regarding Cohen's management of Hingham's drug business so outweighs any conceivable inferences to the contrary that such inferences cannot be said to constitute substantial evidence in support of the board's decision.14

Recognizing that "caution should be exercised by a court in ordering the issuance of occupational licenses,"15 the Court nevertheless noted the time consumed by the litigation and accepted as appropriate the trial judge's decision to order the granting of registration and the permit rather than to remand the matter for further proceedings.

It is entirely possible that this case will be cited as frequently as Milligan. The latter case recognized the jurisdiction of the Superior Court to review agency decisions in cases in which the parties had a constitutional right to a hearing, a principle already explicitly included in the State Administrative Procedure Act. But Cohen is really the first comprehensive attempt by the Court to clarify the Act's quite ambiguous "substantial evidence" test. It is a relief that the agencies have now been placed on notice that decisions must be reasonably supported by a legitimate view of all of the evidence, not merely by interpretation of selected parts of a record. This is wholly consistent

14 Id. at 237, 214 N.E.2d at 67-68.
15 Id. at 238, 214 N.E.2d at 68.
with the function of judicial review. A judicial search limited to overt errors of law is of little comfort to the litigant who has been prejudiced by an agency's warped reactions to evidence which it has received.

The Supreme Judicial Court acted with its customary skill and restraint. But the case leaves little to cheer about with respect to what it reveals about the administrative process in Massachusetts. The conclusion is inescapable that the members of the Pharmacy Board acted upon the application in question at least partially on the basis of a desire to discourage the entry of chain-store pharmaceutical operations into the Commonwealth. The transcript of the administrative proceeding reveals that counsel for the intervening Massachusetts State Pharmaceutical Association acted in many respects as counsel for the agency as well. The petitioners literally never had a chance while the matter was in the hands of the administrators. One possible solution with a regulatory agency of this nature is a legislative provision that a certain number of the administrators not be practitioners of the trade or profession which they must govern. The ultimate solution, of course, rests upon the willingness of the appointing authority to examine the calibre of potential appointees from something more than simply a political viewpoint.

§14.6. Administrative regulations: Requirement of filing. During the 1966 SURVEY year the Supreme Judicial Court decided two cases that related to enforcement of the Commonwealth's minimum consumer resale price law by the Alcoholic Beverages Control Commission. The first of these two cases, *White's Liquor Mart, Inc. v. Alcoholic Beverages Control Commission*,\(^1\) involved the application of General Laws, Chapter 138, Section 25C, after its amendment by Chapter 258 of the Acts of 1963. The second subparagraph of paragraph (d) of Section 25C provides that

\[
\text{[n]o such filing [referring to the submission of proposed minimum consumer prices to the Commission] shall take effect unless within thirty days thereafter the commission shall approve such prices as not being excessive, inadequate, or unfairly discriminatory.}
\]

The amendment added to this language the following:

provided, however, that such approval shall not be deemed a rule or regulation within the meaning of section twenty-four or section seventy-one [of Chapter 138], nor shall such approval be subject to the provisions of chapter thirty A.\(^2\)

It would appear that the General Court sought by this amendment to relieve the Commission from the effect of the decision in *Kneeland Liquor, Inc. v. Alcoholic Beverages Control Commission*,\(^3\) decided De-

\(^{\text{1}}\) 350 Mass. 11, 212 N.E.2d 547 (1965). Two companion cases were also decided by the decision.
\(^{\text{2}}\) Court's emphasis omitted.
November 12, 1962, that approval of minimum price schedules under Section 25C constituted a "regulation" as that term is defined by Section 1(5) of Chapter 30A.

The amendment became effective in April, 1963, by means of an emergency preamble. The Commission approved minimum prices for the May-June and July-August, 1963, periods, but apparently convinced that Chapter 258 of the Acts of 1963 made further action unnecessary, neglected to file the prices with the Secretary of the Commonwealth pursuant to General Laws, Chapter 30, Section 37, which states:

Notwithstanding any special or general law, every commission vested by law with the power to make and issue rules or regulations general in scope, shall file an attested copy thereof, together with a citation of the law by authority of which the same purport to have been issued, with the state secretary, and such rules or regulations, whether or not they require the approval of the governor and council before taking effect, shall not take effect until so filed.4

The petitioners were charged with violating the minimum consumer price schedules for the periods in question, and suspensions were imposed. After the filing of petitions for judicial review pursuant to Section 14 of Chapter 30A, a judge of the Superior Court ruled that, despite the language of Acts of 1963, Chapter 258, the provisions of Section 37 of Chapter 30 still applied to the minimum prices, and accordingly the schedules were invalid for lack of proper filing by the Commission. The Commission appealed from final decrees ordering that the suspensions be quashed, and the Supreme Judicial Court affirmed in each of the cases.

The Court commented as follows:

Nothing in the 1963 amendment of c. 138, §25C(d), purported to relieve the bimonthly price schedules, which inherently were regulations, from the provisions of c. 30, §37, as amended. Section 37 operated, by its own terms, and of its own force, to prevent the price schedules from taking effect. The provision of St. 1963, c. 258, to the effect that G.L., c. 30A is no longer to govern approval of a price schedule under c. 138, §25C(d), did not make c. 30, §37, inapplicable, notwithstanding the reference to c. 30, §37, found in c. 30A, §5.5

The Court is, of course, correct that the minimum consumer price schedules are "regulations" by their very nature. It is interesting to speculate upon the result had the General Court managed actually


to achieve its apparent design, and couch Chapter 258 of the Acts of 1963 in such language that the requirement of filing under Section 37 of Chapter 30 would be eliminated. Would legislative insistence that a regulation was not really a regulation have the effect of relieving the agency in question from adherence to ordinary standards applicable to quasi-legislative operations? The answer would probably be in the negative. There is a constitutional dimension here which cannot be ignored. If the retailers are to be required to comply with minimum price schedules imposed by an administrative agency, they are certainly entitled to the notice of the existence of such schedules which would be provided by a public filing. The agency could, in the alternative, notify each retailer within the Commonwealth individually every two months. It is unlikely, however, that the administrators would select this method when the far simpler procedure provided by Section 37 of Chapter 30 would be available.

One wonders why this particular agency has such a passion for secrecy. Surely its members must be aware that the public is entitled to know how the Commonwealth's liquor control laws are being administered. Whatever the academic interest in the question whether minimum consumer price schedules are "regulations," and consequently governed by the provisions of Section 37 of Chapter 30, there is no intrinsic reason why the agency should not file or otherwise publish the results of its actions with respect to retail prices in any event. The requirements of Section 37 can be fulfilled by the simple expedient of submission of a certified copy of the regulation in question and a covering letter to the office of the Secretary of the Commonwealth. A trip to the Supreme Judicial Court in an effort to avoid this routine (and certainly understandable) requirement strikes this writer as entirely unwarranted.

§14.7. Administrative regulations: Determination of emergency.

In another case involving the Alcoholic Beverages Control Commission, the Supreme Judicial Court upheld the validity of suspensions imposed by the agency for violation of certain emergency minimum consumer price regulations. In Pioneer Liquor Mart, Inc. v. Alcoholic Beverages Control Commission the Court considered the validity of certain price schedules approved by the Commission for the two-month period of March and April, 1963. The Commission had not conducted a public hearing prior to approval of the prices. Rather, the Commission simply voted:

(1) to approve certain price schedules for the months of March and April as not being excessive, inadequate, or unfairly discriminatory, and (2) that the foregoing vote and regulation be declared an "emergency" regulation, ... "there being insufficient time in this instance for the [c]ommission to comply [with the notice and public hearing requirements of Chapter 30A] and it being contrary to the public interest to allow the months of

March and April to pass without the establishment of legal and proper minimum consumer resale prices."2

The petitioners were charged with violating the minimum consumer resale prices in question. After a hearing, the Commission imposed suspensions. A judge of the Superior Court ruled that the Commission had not committed error of law, and that its decision was not unsupported by substantial evidence. The petitioners appealed from final decrees affirming the Commission's decisions.3

The Court referred once again to Kneeland Liquor Mart, Inc. v. Alcoholic Beverages Control Commission,4 to the effect that the Commission's approval of minimum price schedules under General Laws, Chapter 138, Section 25C, constitutes a "regulation" in the sense used in the Administrative Procedure Act. Kneeland left undecided the question whether such regulations must be promulgated under Section 2 or Section 3 of Chapter 30A, and the Court does not treat with the question in this decision either. Since emergency action may be validly taken under either Section 2 or Section 3, the Court restricted its consideration simply to the issue whether emergency action was justified under the circumstances. The Court, parenthetically, also continued to avoid the question of whether proceedings involving the approval of prices were "adjudicatory" because they related to prices to be charged for specific branded beverages of particular manufacturers.5

The Court commented: "The commission, of course, is not intended by §25C(d) blindly to endorse any schedule of prices submitted to it. On the contrary, the commission must decide upon some form of substantial information or evidence whether such prices comply with the statutory standard."6 In a footnote which may prove to be embarrassing to the Commission, the Court detailed a number of categories of evidence or information which might be relevant to the consideration of suggested minimum prices;7 it has been common knowledge that many of these have traditionally been ignored by the ABC. The Court recognized that the occasion for the exercise of the "emergency" provisions of Chapter 30A was undoubtedly the difficulty encountered by the Commission in adjusting to the requirements of Kneeland decided two months earlier.8 The justices further noted that emergency findings must be carefully scrutinized because, if improperly made, they might lead to evasion of the provisions of Chapter 30A and to other serious abuse.

2 Id. at 1467, 212 N.E.2d at 551-552.
3 Id. at 1468, 212 N.E.2d at 552.
5 See §14.6, note 3, supra.
6 Id. at 1471, 212 N.E.2d at 554.
7 Id. at 1471 n.8, 212 N.E.2d at 554 n.7.
8 Id. at 1471-1472, 212 N.E.2d at 554.
Nevertheless, the Court upheld the validity of the emergency regulations:

Despite the meager character of the commission's statement of the "emergency" in respect of its approval of the price schedules, we cannot say that it was insufficient. The commission's statement must be viewed in the light of the commission's apparent difficulty in adjusting itself to compliance with §25C as interpreted in the Kneeland decision. The record does not justify us in concluding that the commission had no substantial basis for the finding that the public interest required promulgation of some price schedule for March and April, 1963.9

The decision is by no means a surprising one, given the reasonable tendency of courts to defer wherever possible to the views of administrators with respect to practices in their particular industries. But the decision is of interest partially because it is apparent from it that the Supreme Judicial Court is becoming impatient with the operations of this particular agency. It is a fundamental tenet of administrative law that the prime purpose of an agency is to protect the public interest and not simply to represent members of the trade or profession which is being regulated. There is entirely too much reliance by the ABC upon assurances with respect to industry conditions made by members of the industry who could be adversely affected by negative agency action. Hearings must do something more than simply provide an opportunity for interested parties to present their views to an already sympathetic Commission. It is to be hoped that the ABC may take seriously the Court's view with respect to the categories of evidence or information which should be considered; unfortunately, there has been little indication at this time that the decision is having this effect.

The fact of the matter is that the entire area of alcoholic beverages price control needs to be totally reconsidered. Enforcement by the agency has tended to be poor and selective, despite the large number of investigators assigned for this purpose. The agency has relied too heavily upon the Department of the Attorney General to do its fact-finding as well as to advise it on legal questions. The present system of erratic enforcement is intolerable. The General Court must, sometime in the near future, either determine that the price control statutes are to be fairly and uniformly enforced, or else alcoholic beverages price control must be done away with entirely.

9 Id. at 1473, 212 N.E.2d at 555.