Chapter 12: Administrative Law

John P. Clair

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml
Part of the Administrative Law Commons

Recommended Citation
CHAPTER 12

Administrative Law

JOHN P. CLAIR

§12.1. General. Several years ago, Mr. Justice Frankfurter made the observation that more than one third of the decisions of the Supreme Court of the United States involved judicial review of administrative decisions. While the administrative law has assumed a posture of maturity in the Federal Government, it is still in the throes of growth in this Commonwealth and has not, as yet, assumed as significant a role as it has in some other states.

The attempt of the administrative agency to flex its muscles in the Colangelo case, together with the Supreme Judicial Court’s decision sustaining the legislative enactment which encouraged it, may, however, be the harbinger of administrative maturity that will soon equate its image here to that in other jurisdictions. The agency behavior in the Harris case, on the other hand, tends to retard this development.

Each year the General Court is enlarging the powers of administrative bodies, and the Supreme Judicial Court is laying down judicial standards for the evaluation of evidence and the interpretation of these statutes. The resulting assumption of more and more responsibility thus increases the number of matters adjudicated by these agencies. Recognition of the growing importance of the administrative law was the catalyst which made possible the enactment of the State Administrative Procedure Act in order to provide a system of uniformity to guide administrative authorities.

§12.2. Findings of administrative agency: Scope of review. Some recent cases affecting decisions of the Contributory Retirement Appeal Board have provided important milestones in the continuing evolution of the applicability of the Administrative Procedure Act and the responsibility of the administrative agency acting under it. A review of the Supreme Judicial Court’s position vis-à-vis that of the administrative authority revealed in Baruffaldi v. Contributory Retire-

JOHN P. CLAIR is General Counsel, Massachusetts Banking Department. He is draftsman of the State Abandoned Property Law (1950) and the Bank Holding Company Act (1957), and co-draftsman of the Retail Instalment Sales of Motor Vehicle Act (1958).

§12.1. 1 See §12.10 infra.
2 See §12.11 infra.

Published by Digital Commons @ Boston College Law School, 1962 1
ment Appeal Board ¹ is helpful in an appraisal of the judicial development of the latter. In that case, a member of the retirement system who had a history of heart disease and had been advised medically not to engage in discussions that would emotionally upset him died some twenty-four hours after involvement in an argument concerning the construction of a building for the city. The board found that his ". . . death undoubtedly resulted from the impact upon his already diseased heart, of the argument which took place on the morning of December 31 . . ." While the board followed this with a ruling that death was not the result of a "personal injury" within the meaning of G.L., c. 32, §9(1),² which it had to do in order to justify its decision denying petitioner's appeal for benefits, it left itself open to challenge on the subject as to what constitutes "personal injury."

The Court, relying upon Madden's Case,³ reversed the board by holding that the death was the natural and proximate result of a "personal injury" sustained as a result of and while in the performance of the decedent's official duties. Madden's Case held that the words "personal injury" in the Workmen's Compensation Act⁴ could be equated to an aggravation of a pre-existing heart disease by exertion or strain. This meaning is that intended in Section 9(1). It appears that once the board found that death was the result of the argument on December 31, it could not escape reversal.

While the Baruffaldi decision was important in the area of statutory construction, it was doubly so because of the impact it had on hastening the judicial maturity of the administrative authority. This was evident in Cataldo v. Contributory Retirement Appeal Board.⁵ Here, on facts close enough to Baruffaldi for our purpose, the Court sustained the board's decision denying benefits. It appears upon the basis of the evidence most favorable to the petitioner that the deceased, a third-class power plant engineer, worked his usual shift from 3:00 P.M. to 11:00 P.M. on November 22; that his replacement failed to report at 11:00 P.M.; that the deceased agreed to work the shift from 11:00 P.M. to 7:00 A.M. November 23; that about 3:00 A.M. he became ill and asked for relief which was not forthcoming; that about 5:00 A.M. he was found unconscious on the floor, and that he died at 10:45 A.M., his death being caused by acute myocardial infarction. There was evidence of a prior "heart condition." Here the board found that


² "If the board, upon receipt of proper proof, finds that any member [of the contributory retirement system] in service died as the natural and proximate result of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time . . . without serious and wilful misconduct on his part, the payments and allowances hereinafter referred to . . . shall be granted to his beneficiary or beneficiaries, in the sum or sums, and upon the terms and conditions, specified in this section . . ." (Emphasis supplied.)


⁴ G.L., c. 152, §1(7A).

Cataldo did not die as a result of an injury sustained by him, which could be causally related to the performance of his duties. It would not be too difficult to find on these facts that this death was the result of a "personal injury" under the provisions of G.L., c. 32, §9(1), as defined in the Baruffaldi case. The point here, however, is that the board proved how well it learned the lesson of that case. Its decision was, no doubt, based on the creditable evidence before it, and it made its finding without the gratuitous observation made in the Baruffaldi case. In these cases, a mere finding that death did not result from a personal injury sustained in the performance of the deceased's duties will be sufficient and the Court will sustain it, provided always, of course, that it is based upon "substantial evidence," as indicated in State Board of Retirement v. Contributory Retirement Appeal Board.

§12.3. Scope of judicial review of administrative decisions. The Superior Court is authorized to set aside or modify an agency decision "... if it determines that the substantial rights of [a] party may have been prejudiced because the agency decision is ... not supported by facts found by the court ... in those instances where the court is constitutionally required to make independent findings of fact." McCarthy v. Contributory Retirement Appeal Board appears to be a case of first instance dealing with this abstract issue. The Contributory Retirement Appeal Board, in affirming the action of the State Board of Retirement denying benefits, made the usual finding that the deceased did not die as a result of a "personal injury" sustained within the meaning of G.L., c. 32, §9. There was sufficient creditable evidence to support its position. The judge in a somewhat inscrutable action reversed the appeal board on the ground that its decision was "unwarranted by facts found by ... [him] on the record as submitted." The Supreme Judicial Court gave short shrift to this latitude in applying the statute and in a few words set aside the action of the Superior Court, stating that because the board's decision rested upon substantial evidence the judge had no power to reverse it. It further held that there was no constitutional requirement in this case that the Superior Court make independent findings within the meaning of the statute. While under what circumstances there would be a constitutional requirement for the court to make such independent findings is left without comment, the case adds further substance to the growing importance of the administrative decision in our juridical history.

§12.4. Appeal by an administrative agency. The State Administrative Procedure Act defines "person" to include all political sub-divisions of the Commonwealth. Section 14 of the act provides that "any person ... aggrieved by a final decision of an agency in an adju-

6 G.L., c. 30A, §1(6).
8 G.L., c. 30A, §14(8)(f).
10 G.L., c. 30A, §1(4).
dicatory proceeding . . . shall be entitled to a judicial review.” In State Board of Retirement v. Contributory Retirement Appeal Board, the state board appealed a decision of the appeal board, which had reversed its decision unanimously denying an application for benefits. The Superior Court heard the case on the merits upon the record of the appeal board. The judge reversed the appeal board and overruled the claimant’s demurrer. One ground of the demurrer was that the state board could not be a “person . . . aggrieved” within the act and, therefore, the Superior Court had no jurisdiction.

This appears to be the first case in which the right of the administrative authority to appeal under the act has been questioned. While such judicial review has not been unusual, any doubt on the matter was settled by this decision of the Supreme Judicial Court. The Court stated: “The state board has an obligation to protect the integrity of the state system and the interests with respect to that system of the public and of the state’s taxpayers.” When the protection of the public interest is in issue, the “rights of review granted by c. 30A are not to be interpreted narrowly.” An administrative agency being a political subdivision of the Commonwealth is apparently charged with the responsibility of seeking a final adjudication of its findings when reversed, particularly when a broad public interest is involved.

§12.5 Requirement of statement of reasons by agency. A decision by an administrative agency which is rendered after an adjudicatory proceeding based on the provisions of the Administrative Procedure Act must “. . . be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision . . . .” Upon appeal from such decision the court is required by the statutory directive to determine whether material rights of a party have been prejudiced because the agency decision was “unsupported by substantial evidence.” In Salisbury Water Supply Co. v. Department of Public Utilities the department, differentiating between water companies and other types (electric-telephone-gas) of utilities, held that a rate of return (on equity) of 6.5 percent was a fair one and thereby disallowed such increase in charges to the consumer as

2 342 Mass. 58, 172 N.E.2d 234 (1961) (the actual appellant here was Ethelyn E. Fingold, who applied under G.L., c. 32, §9(1) for an accidental death benefit as the widow of Attorney General George Fingold).
3 G.L., c. 30A, §14.

§12.5. Requirement of statement of reasons by agency. A decision by an administrative agency which is rendered after an adjudicatory proceeding based on the provisions of the Administrative Procedure Act must “. . . be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision . . . .” Upon appeal from such decision the court is required by the statutory directive to determine whether material rights of a party have been prejudiced because the agency decision was “unsupported by substantial evidence.” In Salisbury Water Supply Co. v. Department of Public Utilities the department, differentiating between water companies and other types (electric-telephone-gas) of utilities, held that a rate of return (on equity) of 6.5 percent was a fair one and thereby disallowed such increase in charges to the consumer as
would provide a return of 7.73 percent. This decision was not accompanied by a statement of reasons to support it, as required by the statute. So far as material it stated:

The department is of the opinion that an overall rate or return of 6.5% is sufficient to enable this company which has a high proportion of seasonal customers to attract the necessary additional capital required in the immediate future. We are, therefore, providing in our order that the company refile with the department rates that will produce annual net operating income of approximately $31,536.

The Supreme Judicial Court made reference to the total lack of evidence to support the “comparison of water companies with other companies.” The findings, without any statement of reasons therefor, were arbitrary and baseless, and new hearings before the department were ordered.

**§12.6. Exhaustion of administrative machinery.** The administrative agency cannot be bypassed by a litigant when the statute offers him relief before the agency. In *Church v. Building Inspector of Natick*, the respondent denied a building permit to Church on the ground that the proposed building would not conform to the building code. Upon this denial the applicant had the right to appeal to the town board of appeals. He did not do this, but rather filed a petition seeking the issuance of mandamus to command the building inspector to grant the permit. The Superior Court was sustained in its denial of the petition for failure by the applicant to exhaust his remedy as provided in G.L., c. 40A, §13. When the administrative agency is authorized to act, it cannot be ignored.

**§12.7. Zoning decision: Modification of findings.** General Laws, c. 40A, constitutes a comprehensive statutory guide for the administrative authority in the very important area of zoning regulations. While this subject more properly belongs in another chapter, we are required to deal with it here, not with respect to its effect on a decision on the merits, but rather as a further analysis of the evolution of administratio-

---

5 The department granted the petitioner's request for the following rulings: "12. A fair return is one which is sufficient to insure confidence in the financial soundness of the utility, adequate to maintain and support its credit, sufficient to enable it to attract the capital required to meet its public obligations and commensurate with that generally being earned on investments in business undertakings attended by corresponding risks. 13. The rate of return employed for testing the reasonableness of rates must be such that the utility has a reasonable chance actually to earn a fair return in the foreseeable future, taking into account the continued necessity, if any, of making plant additions and replacements at higher unit costs, and the general tendency of the return to erode under the impact of inflation on operating expenses."


2 "Chapter 40A, §13 (as amended through St. 1955, c. 325, §1), permits an appeal to the board of appeals 'by any person aggrieved by reason of his inability to obtain a permit from any administrative official under the provisions of this chapter.'"
§12.8  ADMINISTRATIVE LAW

tive power. In *Dion v. Board of Appeal of Waltham*, the board, after a public hearing on May 3 as required by the statute, rendered a decision that was recorded with the city clerk on May 9. This original decision was based upon findings that recited substantially the words of the statute authorizing the board to act. Such a decision without actual findings of fact is deficient in zoning cases.

Subsequent thereto, on May 20, in an executive session, the board amended its original decision, adding thereto several additional findings to justify its determination. On May 24, at a public hearing, it ratified its action of May 20. The statute gives an aggrieved party twenty days to appeal the agency decision to the Superior Court.

§12.8. Authority powers: Limitations under enabling act. As it subsequently was to do in the *Colangelo* case, the Supreme Judicial Court in *Town of Barnstable v. Woods Hole, Martha’s Vineyard and Nantucket Steamship Authority* curbed an administrative grasp for power sought in contravention of the legislative purpose. Acts of 1960, c. 701, created an authority to provide transportation between the islands of Nantucket and Martha’s Vineyard, and Woods Hole on the mainland. The membership of the authority comprises three people: one from each of the towns of Falmouth (Woods Hole) and Nantucket, appointed by the selectmen, and one from Dukes County, appointed by the county commissioners. The question in the present case was whether the authority could expand its area of service to include Barnstable (Hyannis).

Section 1 of Chapter 701 states, so far as material: “In order to provide adequate transportation of persons and necessaries of life for the islands of Nantucket and Martha’s Vineyard, the Authority is hereby authorized and empowered to purchase, construct, maintain and operate necessary vessels, docks, wharves . . .” Section 4(e) empowers the authority “. . . to contract by license, lease, charter or other arrangement for the provision of excursion service by other


The actual proposal was to provide summer transportation between Nantucket and Hyannis.
persons to and from the islands of Martha's Vineyard and Nantucket from any point on the mainland of the Commonwealth, when it shall be deemed necessary or desirable to serve the purposes of this act."

Clearly, the authority could contract with others to provide service to Hyannis. Its contention was, however, that it would be unsound to construe the act as authorizing others to do what it could not do itself, namely, arrange "... for the provision of excursion service by other persons to and from the islands ... from any point on the mainland ...". After brushing aside the lack of a statutory definition for the phrase "excursion service," the Court stated that Section 4(e) means exactly what it says, "service by others." To hold otherwise would have required the Court to so discern the legislative intent as to permit the authority "... to enter into any Massachusetts port, for example, Boston, Gloucester, or Plymouth ..." with the consequent exemption from taxation provided for in the act.4

After commenting upon the local character of the authority's membership, and the fact that deficiencies in its operation were to be assessed 50 percent against Dukes, 40 percent against Nantucket and 10 percent against Falmouth, the Court summarily reversed the lower court decree sustaining the authority's contention that it had the power to operate between Hyannis and the islands, and entered a new one precisely antithetical thereto.

The far-reaching implications of the agency position were understandably not apparent to it nor to the Superior Court judge. The legislative consideration of the act never encountered the comprehensiveness inherent in the veiled simplicity of the proposal to provide summer service between Hyannis and Nantucket. The Court stated it thus: "If such was the legislative intent, the opportunity is ... available for obtaining its expression in terms which are clear and direct."

§12.9. Rule-making: Powers of board. A three-pronged attack on the validity of a regulation promulgated by an administrative authority confronted the Supreme Judicial Court in Silverman v. Board of Registration in Optometry.1 The petitioner, a registered optometrist, sought to establish an office on the premises of a department store (Gem) in contravention of the board regulation which prohibited this action.2 Silverman contended in his bill that the rule-making power conferred on the board 3 does not include the authority to prohibit

2 The regulation (No. 17) promulgated by the respondent board in 1951 provides, "No optometrist shall conduct the practice of his profession in or on premises where a commercial or mercantile establishment is the primary business being conducted."
3 General Laws, c. 112, §67, provides: "The board shall make rules and regulations governing its procedure, governing registration and applications therefor, and governing the practice of optometry. Said rules and regulations shall be consistent with the provisions of sections sixteen to eighteen, inclusive, of chapter thirteen and sections sixty-six to seventy-three, inclusive, of this chapter." (Emphasis supplied.)
§12.9 ADMINISTRATIVE LAW

him from conducting his business on the premises of an establishment devoted primarily to a commercial or mercantile operation; that the legislature has reserved to itself the power to determine the geographical location of optometrists' offices; and, finally, that the regulation is unconstitutional because it is not within the police power of the Commonwealth to so limit his right to engage in a lawful occupation.

The practice of optometry is defined in G.L., c. 112, §66, as being the employment of "... any method ... other than the use of drugs, for the diagnosis ..." of defects in the human eye and for the prescription of means to correct them. In his first contention, the petitioner claimed that because the board's rule-making power refers to the "practice of optometry" it must necessarily confine itself to the actual, statutorily defined practice, and the location of the business is of no moment to it. On this point the Court stated its disagreement. The sole purpose of Section 66 was to distinguish the business of the optometrist from that of the optician and from that of the ophthalmologist. It was necessary, said the Court, to read the term "practice of optometry" in Section 67 without being limited by Section 66.

To restrict the delegation of rule making power in the manner suggested by the plaintiff would mean that the board (aside from regulations governing its procedure, registration, and application therefor) was limited to making regulations concerning how the optometrist actually diagnoses and corrects his patients' visual faculties. It is hardly likely that the Legislature intended such a result.

The basis of the petitioner's second contention was G.L., c. 112, §73B, which prohibits the location of an optometrist's office on the same premises "... whereon eyeglasses, ... are sold by any other person ..." This statute also makes illegal a fee-splitting arrangement between an optometrist and one not authorized to engage in the business. The Court saw no conflict between this statute and the regulation. It stated: "We find no merit in the plaintiff's contention that the power exercised by the board in regulation No. 17 is an exclusively legislative power which cannot constitutionally be delegated." 4

The petitioner finally rested his argument on the Declaration of Rights in the Massachusetts Constitution. He challenged the regulation as being an interference with his right to engage in a lawful occupation. The Court, relying on the line of cases which hold that the public interest requires regulation of professions, sustained this par-

4 See Ritholz v. Indiana State Board of Registration & Examination in Optometry, 45 F. Supp. 423, 435 (D. Ind. 1937); Bennett v. Indiana State Board of Registration & Examination in Optometry, 211 Ind. 678, 687, 7 N.E.2d 977, 982 (1937); Abelson's, Inc. v. New Jersey State Board of Optometrists, 5 N.J. 412, 425-424, 75 A.2d 867, 873 (1950).

ticular regulation as a valid exercise of the legislative police power.

§12.10. Judicial review: Order in excess of agency authority. An attack
on the constitutionality of a legislative enactment in the field
of civil rights\(^1\) opened an avenue for the Supreme Judicial Court to
give judicial direction in Massachusetts Commission Against Discrimi-
nation v. Colangelo\(^2\) to those likely to be affected in the future, as well
as an opportunity to alert the administrative agency that it will not
countenance an abuse of its delegated power. This case dealt with
alleged discrimination in the renting of a unit in a privately owned
and financed multiple-apartment building. After a hearing, the com-
misson issued an order requiring the respondent owner not only to
rent the apartment sought, but also to pay the prospective tenant dam-
ages sustained because it was necessary for him to rent other quarters
at a higher amount. The order contained, as well, some fairly harsh
demands described in the minority opinion (Kirk, J.) as "coercive" in
nature. Therespondent raised no objection to the order before the
commission, and he did not subsequently seek to do so in the Superior
Court. He stood upon the constitutionality of the act, thus making
this the only issue before the Supreme Judicial Court. (To challenge
the order, Colangelo was required to urge it first upon the commis-
sion.)\(^8\)

The Court went beyond this issue — which in itself was so vital that
the decision produced two dissents, the incisive one (Kirk, J.) unfortu-
nately being of such brevity as to whet the legal appetite and hinting a
judicial resoluteness to stand fast against further encroachment on con-
stitutional guarantees. While not necessarily germane to the effect the
case has on the administrative law, it is difficult to resist comment on
Kirk's judicial posture. His erudition strikes with such impact that it
should convince the courts and legislators of the possible need to re-
appraise the constitutional mandates in the light of the demands being
thrust upon them by ideological theories which, while seeking laudable

S. S. Kresge Co., 267 Mass. 145, 166 N.E. 558 (1929); In re Cohen, 261 Mass. 484,
159 N.E. 495 (1928) (attorney); Commonwealth v. Houtenbrink, 235 Mass. 320, 126
N.E. 669 (1920); Klein v. Department of Registration & Education, 412 Mass. 75, 105
N.E.2d 758 (1952); Abelson's, Inc. v. New Jersey State Board of Optometrists, 5 N.J.
929 (1952).

§12.10. ¹ General Laws, c. 151B, §4, inserted by Acts of 1946, c. 368, §4 (as
amended through Acts of 1959, c. 239, §2), states: "It shall be an unlawful prac-
tice: ... [subsection] 6. For the owner, lessee, sublessee, assignee or managing
agent of publicly assisted or multiple dwelling or contiguously located housing
accommodations or other person having the right of ownership or possession or
right to rent or lease such accommodations: — (a) to refuse to rent or lease or
otherwise to deny to or withhold from any person or group of persons such accom-
modations because of the race, creed, color or national origin of such person or
persons; (b) to discriminate against any person because of his race, creed, color or
national origin in the terms, conditions or privileges of such accommodations or in
the furnishing of facilities or services in connection therewith . . . ."

objectives, could unintentionally destroy constitutional liberties. Mr. Justice Kirk has reached the heart of this issue:

And now, indeed by a six-word amendment, purely private property lies exposed to the full impact of the drive. It should give us pause . . .

The court has, nevertheless, given its approval to the legislation without the slightest showing which would justify it even temporarily or on an emergency basis. Surely this court as the guardian of our Constitution should require more than mere legislative fiat before countenancing legislation of this character. The bare exercise of the police power by the Legislature should not, ipso facto, be held to constitute, in all cases, a legitimate exercise thereof. Thus to hold would drain the constitutional restraints of their vitality. However, in context, the fair implication of the majority opinion is that the legislative act is conclusive.

It is also my firm conviction that the degree of interference authorized by the statute constitutes an appropriation for a public purpose of the owner's property without his consent, with no showing that "the public exigencies require" it, and for which the owner has received no compensation whatsoever. This is in direct violation of art. 10 of the Declaration of Rights and the Fourteenth Amendment to the Constitution of the United States.

The majority opinion sustained the constitutionality of the act upon the usual grounds: "It is only when a legislative finding cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain it that a court is empowered to strike it down . . . If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature." The Court goes on at some length to buttress its stand further in this case of first impression by following the generally accepted pattern established in jurisdictions in which the enlightened approach to civil rights has resulted in similar decisions affecting related problems. The statutes and decisions in the fields of education, transportation, amusement and other "analogous situations" including publicly aided housing rationally withstand the studied gaze of the constitutional advocate. These endeavors are not private; they are by their very nature public and thus the proper subject of legislative concern.

In the Colangelo case, the Court refused to implement its decision by allowing the administrative order to stand. In fact, the effect of its ultimate adjudication was to strike it down almost in toto. The Court seems to hold that while the act is a constitutional exercise of

4 Acts of 1959, c. 239, §2 ("or multiple dwelling or contiguously located").
the legislative police power, the administrative authority may act under it only with restraint. It is important here to understand that the agency's order was not challenged in the manner provided by statute, but this did not deter the Court from acting even though the matter was not properly before it. The range and intensity of the order prompted this step, the consequence of which was that the part which ordered the respondent to make an apartment available to the applicant was sustained. The whole order would have required the owner respondent to (1) give the applicant the same privileges, services, benefits and rental concessions accorded the most favored tenant, (2) inform his employees in writing of the objectives of the Massachusetts Fair Housing Practices Law and remitting evidence to the commission of compliance therewith, (3) post the commission's notice conspicuously in easily accessible, well-lighted places on the premises, (4) transmit to the commission forthwith a list of all available apartments with rent being asked, number of rooms and so forth, (5) include in his usual advertising media for ninety days the information that his apartments are subject to the Massachusetts Fair Housing Practices Law, and are available for rental without regard to race, color, creed or national origin, and (6) pay damages to applicant. These orders were held by the Court to exceed the delegated authority of the commission.

While the administrative boldness made the Court's action necessary, it also points up what may be a much too liberal delegation of authority on the part of the legislative branch. There is no argument with the thesis that the "changing needs of society" require a "legitimate exercise of the police power," but there is some doubt as to the advisability of enactments that encourage agencies to issue orders so drastic in content as to completely fracture private rights. The position that the General Court should legislate more cautiously in the field of private property rights may have much cogency in view of the Supreme Judicial Court's stand upon the constitutionality of enactments in this sphere.

§12.11. Conduct of administrative hearing: Requirement of fairness. A failure of an administrative authority to understand its place and consequent responsibility in the administrative-judicial scheme caused it to be admonished by the Supreme Judicial Court in Harris v. Board of Registration in Chiropody1 for lack of impartiality in the conduct of a hearing. This was the second petition for review, the first having been remanded by a single justice because of inadequate findings. The order for remand suggested several guides to aid the agency in its deliberations, none of which were followed. The board was not required to give notice and take evidence in order for it to adopt regulations as provided in the Administrative Procedure Act.2 It was, however, necessary for it to conduct its hearings, not according to a layman's concept of procedure "... even though, as the statute

permits, more latitude is to be allowed than in court," but with such decorum as will not cast serious doubts on its impartiality. The case was again remanded with an order for a further hearing to be begun within sixty days and with definite instruction ". . . that the board is to determine its action only on the evidence there adduced."

§12.12. Subsidiary fact finding: Mutually exclusive licenses. Bay State Racing Assn. v. State Racing Commission1 was before the Supreme Judicial Court on two occasions in the twelve-month period from May, 1961, to May, 1962, and for the purposes of this discussion is considered as one case with a reasonably important bearing on the state Administrative Procedure Act2 as it applies to an "aggrieved" person within the meaning of Section 14, and the likelihood that an administrative authority will face reversal if a decision is not based upon adequate subsidiary findings of fact. The case is also worthy of attention because of its reiteration of the modern concept which holds that the legislative delegation of power does not necessarily have to be enshrined within reasonably definitive standards.

The State Racing Commission acts under the provisions of G.L., c. 128A, which, among other things, gives the commission the power to assign dates to applicants seeking to operate harness racing subject to the usual public hearing but limited to an assignment of not more than a total of 90 racing days per year. Other than a statutory restriction on the locus of a track and the 90-day limitation, there is such a paucity of specific legislative standards so as to raise a serious question concerning the constitutionality of the enactment.

The Supreme Judicial Court again took the position that it was "... bound so to interpret the statute as to avoid serious doubts about its constitutional validity." 8 This question was artfully handled through the vehicle of inference — it is inferred, the Court held, that the commission is to be guided by what public convenience, interest and necessity require, giving due regard to specific standards which the Court supplied. This is the broad approach to the problem of giving effect to the legislative will, and not too long ago it constituted the minority opinion.4

In this case, the racing commission, upon the application of the petitioner (Bay State) for 67 racing days, granted a license for 57 days and in a separate proceeding granted 33 racing days to Eastern Racing Association, Inc. (Eastern), thus assigning the total of 90 racing days. An important issue in the case was whether Bay State was a party aggrieved under the provisions of Section 14 of the Administrative Procedure Act. As a result of its total action, the racing commission was precluded from granting Bay State its request for 67 days.

2 G.L., c. 30A.
There appears to be no Massachusetts case dealing with these facts. In this case are competitors which the Court described as having mutually exclusive demands. "If Eastern is given 33 days, Bay State... cannot be given 67 days." If this were a case dealing with competitors in the usually accepted sense, it could have been readily resolved. The Court held: "In this type of situation the comparative appraisal of competitors is essential." This is the doctrine of Ashbacker Radio Corp. v. Federal Communications Commission. The Ashbacker case expresses the federal position which holds that when two or more persons seek mutually exclusive privileges or licenses each applicant has an interest entitling it to hearing and review by some method that successfully compares the applicants in the light of applicable aspects of public interest. Relying upon the Ashbacker case, the Court in the present case held that Bay State was an aggrieved person and thus entitled to judicial review of the commission's denial of its application, as well as its action in granting Eastern the license that prevented Bay State from receiving the 67 days it sought. The Ashbacker doctrine seems a wise one in this type of situation.

In the first of these two cases the petitioner alleged that for the racing commission to refuse the license sought (Bay State's application for 67 days) it must make appropriate findings of fact to justify its denial of the petition as presented. The Court agreed with this contention.

The provisions of G.L., c. 30A, when read with those found in c. 128A, amply establish that it is the duty of the commission to make adequate subsidiary findings of fact to support its decision and to demonstrate that the granting or denial of a license has been passed upon after consideration of relevant aspects of the public interest. It can then be ascertained by a reviewing court from the record before the commission, as contemplated by c. 30A, §14(8), whether the decision and the findings were supported by substantial evidence and otherwise comply with the standards expressed or necessarily implied in c. 128A.

The Superior Court decision sustaining the administrative authority was reversed and remanded because of the failure of the agency to make these subsidiary findings of fact. In the second case, the Supreme Judicial Court sustained the commission, which reached the same result as to the distribution of the days (57 to Bay State, 33 to Eastern) because it made such findings. While the adequacy of the facts found to justify its action seem sparse and somewhat devoid of substance, the Court nevertheless found no difficulty in refusing the petitioner (Bay State) the relief sought.

7 G.L., c. 30A, §§11(8), 13.
§12.13. Rate regulation: Hearing and opinion. An administrative decision rendered without regard to statutory standards and devoid of reasons therefor will not be sustained. In *Massachusetts Medical Service v. Commissioner of Insurance*\(^1\) the respondent commissioner, upon the petition of Blue Shield for authority to increase surgical fees and consequent increases in charges to subscribers, after hearing, issued an order which stated: "after full consideration of all the evidence and under the authority conferred by [G.L.] c. 176B . . . I disapprove the filing made by Blue Shield . . ." No findings were made to support this decision. The standards which govern the commissioner are contained in the statutory delegation provided in the two interrelated paragraphs of Section 4 of Chapter 176B.\(^2\)

Section 12 of Chapter 176B provides for a review of the decisions and orders of the commissioner.\(^3\) This statutory provision for revision of the administrative decision makes it necessary that the grounds of the commissioner's decision appear. The Supreme Judicial Court stated: "What is called for in the Superior Court is review and not a retrial." The effect of this decision was a disapproval of rates. Rate regulation is an administrative function. For the administrative judicial process to withstand constitutional scrutiny in such cases there must be a hearing, even though the statute does not appear to demand one. There having been a hearing at which testimony was taken, "an opinion accompanying the decision is needed to disclose the facts relied on and the standard applied." The Superior Court decrees which sustained the commissioner's naked decision were reversed, the decision ordered vacated, and the proceedings remanded to the commissioner with instructions to issue one, subject to the statutory standards, and with a statement of reasons therefor.

§12.14. Power to license: Total refusal. General Laws, c. 140, §177A, authorizes local licensing boards to issue licenses for the operation of pinball machines. There is nothing unusual in the legislative design, which follows the normal pattern prevalent in such acts.\(^1\) The

---

\(^1\) 1962 Mass. Adv. Sh. 777, 182 N.E.2d 298, also noted in §16.7 infra.

\(^2\) Section 4 of G.L., c. 176B (as appearing in Acts of 1960, c. 307, §1), provides in part: "The form of agreement with participating physicians . . . and the rates at which . . . [they] are compensated for their services to the subscribers or to covered dependents shall at all times be subject to the written approval of the commissioner.

"Any agreement between a medical service corporation and a person whereby such corporation undertakes to furnish benefits for medical service to said person and his covered dependents, if any, shall be considered a non-group medical service agreement. Under such an agreement the form of subscription certificate and the rates charged . . . shall be filed with and receive the prior approval of the commissioner. No such agreement shall be approved if he finds that the benefits provided therein are unreasonable in relation to the rate charged, nor if the rates charged are excessive, inadequate or unfairly discriminatory."

\(^3\) Section 12 of G.L., c. 176B, provides in part: "All decisions and orders of the . . . commissioner made under any provision of this chapter may be reviewed as justice and equity may require upon a petition in equity filed . . . in the superior court within and for the county of Suffolk by any party aggrieved . . . [thereby]."

§12.14. 1 General Laws, c. 140, §177A, ¶(1), provides as follows: "(1) The licensing authorities of any city or town may grant, and after written notice to the licensee,
issue in *Turnpike Amusement Park, Inc. v. Licensing Commission of Cambridge* was whether the commission could arbitrarily decide that no pinball machines of any type would be licensed for the year 1960. The petitioner applied for a renewal of its license and upon being notified of the commission’s no-license policy sought relief under G.L., c. 231A, alleging that it was entitled to be granted a license because the commission did not have the power to refuse a license to a qualified applicant.

The Supreme Judicial Court found little substance in this contention as a basis for reversal of the Superior Court decree entered for the respondent commission. If this were the case, the licensing authority would of necessity be required to issue a license to any responsible person without considering the effect such action would have upon the general welfare of the community. The statute provided no such command to the administrative agency. In this regard, Section 177A contains the word “may” and this “commonly imports discretion.”

The Supreme Judicial Court looked beyond the argument of the petitioner to perceive a far more compelling ground to reverse the decree. It struck down the commission’s no-license edict on the basis that:

The statute does not empower local licensing authorities to make such an over-all denial. Section 177A was enacted to permit the use and maintenance of pinball machines and other automatic amusement devices if duly licensed and used for amusement only. . . . Local authorities may deny a particular license if in their discretion they find that the general good, order and welfare of the community so require.

The legislative delegation did not contemplate such broad and unrestrained authority. If the commission had the power to issue this arbitrary order, the statutory purpose would be negated. The agency was required to consider each application upon its merits.

suspend or revoke a license to keep and operate an automatic amusement device for hire, gain or reward, approved by the director of standards and necessities of life under section two hundred and eighty-three of chapter ninety-four.”

