

The Effect of the Ohio Administrative Procedure Act on Procedure Before the Board of Liquor Control

BY ISADORE TOPPER *

IN GENERAL

It is more than a decade now since the Administrative Law Commission created by the 94th General Assembly (1941), made its study in Ohio of the need for uniform procedures in the adoption of rules by administrative officers, boards, commissions and other authorities and uniform procedures for the issuance, rejection, suspension, and revocation of licenses by state officers and agencies. The results of the studies made by the Administrative Law Commission were in the main adopted by the 95th General Assembly (1943) in the enactment of the Administrative Procedure Act.¹ With the enactment of that law, the Administrative Law Commission was continued by the legislature for the purpose of making a study of the operation of the law. The commission made its report and recommendations to the 96th General Assembly (1945) which, acting upon the recommendations of the commission, made various amendments to the Administrative Procedure Act.² Since 1945, the legislature has amended the Act³ only once and that was as the result of the decision of the Supreme Court of Ohio in the case of *Farrand v. State Medical Board*.⁴ The court had there held that an appeal, pursuant to Section 154-73 of the General Code, to the court of common pleas from an order issued by an administrative authority in the revocation of a license was not a hearing de novo and that the reviewing court could not substitute its judgment for that of the administrative authority. In short, the review then provided by the Act was one to determine "whether the rights of the parties have been determined by the administrative agency in accordance with the statutes appropriate to the proceeding" Findings of fact were seemingly to be accorded complete administra-

*Assistant Attorney General of Ohio, 1931-37 (Counsel for Department of Industrial Relations, Ohio Beer Commission, Board of Liquor Control, and others); formerly on Ohio State Bar Association Administrative Law Committee.

¹ OHIO GEN. CODE § 154-61 *et seq.*

² 121 LAWS OF OHIO 578 (1945).

³ OHIO GEN. CODE § 154-73.

⁴ 151 Ohio St. 222, 85 N.E. 113 (1949).

tive finality. The effect of the amendment was to adopt the test of "substantial evidence on the whole record."⁵

The question arises as to whether the enactment of the Administrative Procedure Act has been helpful and whether it has achieved its primary purpose of assuring applicants for licenses and licensees administrative fair play and justice.⁶ If nothing else, the Act has accomplished one beneficial result and that is the restraining influence it has had on licensing and rule making authorities from acting in tyrannical, arrogant, and ruthless ways. The Act has been a check on the usurpation of power and its improper exercise by administrative authority. The fact that the rule making and licensing power of state administrative officers and agencies is subject to judicial review has caused most agencies to adhere more closely in the exercise of their powers to the basic laws relating to the agencies, as well as the uniform procedures set forth in the Act.

REQUIREMENT OF NOTICE

The rule making procedures outlined in the Act in the main are in clear and understandable language. The question that arises most often is how far may a rule making authority under Section 154-64 of the General Code depart or deviate from the subject matter of the public notice of a hearing of a proposed regulation. That is, can the rule making authority after the publication of the notice of a public hearing on a proposed rule, amendment of a rule, or the repeal of a rule, after the public hearing depart from the stated objective of the public notice and adopt a regulation entirely different in its effect and scope.

That the provisions of Section 154-64 of the General Code were intended to be a brake on rule making power is evident from the language contained therein. It was the purpose and aim of the legislature to give every person affected by or subject to a rule, the opportunity to be heard, before the rule was adopted, amended or repealed. To say that a proposed rule after public hearing can be amended or changed so that it is different in scope than the proposed rule,

⁵ OHIO GEN. CODE § 154-73 provides ". . . the court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such other evidence as the court may have admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law." To compare the federal rule on scope of judicial review of administrative findings of fact, see *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 479 (1951).

⁶ For a discussion of the similar principles and objectives of the Model State Administrative Procedure Act (1946), see Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196 (1948).

would allow rule making authorities to evade the very procedural safeguards set up in Section 154-64 of the General Code in the adoption, amendment, or repeal of rules and would be subject to considerable abuse.

It is a debatable question as to what change in wording made by a rule making authority after holding a public hearing is consistent with the public notice pertaining to the rule. For example, if an agency proposes to amend a rule and then after the public hearing decides to repeal the existing rule instead of amending it, would such action be consistent with the public notice? Many lawyers contend that such a deviation would not be consistent with the public notice and would be beyond the power of the rule making body and contrary to Section 154-64 of the General Code. Recently, the Court of Common Pleas of Franklin county in the unreported case of *Jacobson v. Board of Liquor Control*⁷ struck down Amended Regulation 43 adopted by the Board of Liquor Control on March 21, 1952, because the regulation as adopted was inconsistent with the public notice of the proposed amendment of the rule in that it was more restrictive in scope than the text of the proposed regulation as filed with the Secretary of State and as contained in the public notice of the hearing on the proposed rule. The court in substance held that a rule as finally adopted must be consistent with the *specific subject matter* contained in a proposed amendment as advertised in the public notice of the hearing and as filed with the Secretary of State and *not with the general subject matter* of the regulation.

PUBLICATION OF RULES

A glaring shortcoming of the Administrative Procedure Act is that there is no official published registry for rules and regulations that are adopted by rule making authorities. Even though the Act makes filing of the rules with the Secretary of State necessary in order for them to become effective and requires this official to maintain a file of such rules open for public inspection,⁸ the text of the rules should be made more easily accessible to those whose conduct they govern. The Act should be amended so as to require the Secretary of State to publish and issue bi-monthly a bulletin or report listing the full text of any proposed rule, amendment or rescission of a rule filed with the Secretary of State by any authority, and the date and place of the

⁷ Case No. 184,885 (Nov. 10, 1952).

⁸ OHIO GEN. CODE § 154-75; cf. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4 (1946).

public hearing thereon.⁹ The Secretary of State should also be required to publish the result of the action taken by the rule making body. In addition, the Secretary of State should be required to furnish to the clerk of the common pleas court in each county, the full text of any proposed rule, amendment or rescission of a rule filed with the Secretary of State at least one week after the same has been filed with that state official. The Secretary of State should also be required to furnish to the clerk of the courts of common pleas the full text of the rule, amendment, or rescission of a rule after it has been filed by the rule making agency with the Secretary of State. A registry of all rules, amendments, and rescissions thereof should be maintained by the clerks of the courts of common pleas. In any county where there is an official or recognized court reporting publication it should be required to carry at least a synopsis of a proposed rule and the date and place of public hearing thereon.

PERSONNEL

An obvious shortcoming in the Administrative Procedure Act relates to the qualifications of the personnel of the various state authorities hearing appeals from rejections of applications for permits or citations to show cause why permits should not be suspended or revoked. In the rejection of applications for permits and the suspension and revocation of licenses, the administrative authority or adjudicatory body is required to pass upon the admissibility of evidence and also make orders which are supported by reliable, probative, and substantial evidence in the whole record. In view of the nature of the judicial review now provided by Section 154-73 of the General Code, as amended in 1951, it is expecting too much from the layman composing such authorities, untrained in law, to properly or correctly determine questions of evidence or law.¹⁰ Section 6064-4 of the

⁹ OHIO GEN. CODE § 76-6 (5) provides that "the Bureau of Code Revision shall organize and index all the rules of agencies as described in the Administrative Procedure Act which have been filed in the office of the Secretary of State in compliance with Sections 154-64 and 154-65 of the General Code." The Section further provides that the bureau should publish these rules in such form as it sees fit and maintain current supplements. Up to this time, however, the legislature has made no appropriations enabling the bureau to comply with this mandate. Although the Administrative Procedure Act in Section 154-66 creates a similar duty on each agency "to compile currently, publish, and at all times have available for distribution in book or pamphlet form . . . all rules of general and uniform operation promulgated by it," there is no sanction attached to this requirement, such as rendering the rules ineffective unless published. [Ed. note.]

¹⁰ CAL. GOVERNMENT CODE § 11502 provides that hearing officers shall have been admitted to practice law in that state for at least five years prior to their appointment. For a presentation of the arguments that many of the exclusionary rules of

General Code, creating the Board of Liquor Control does not provide or require that the members of the board have any legal training or experience. Oftentimes the chairman of the board, who conducts its public hearings, will be a layman with no experience or training in passing upon the competency, relevancy, or admissibility of testimony and evidence as well as on questions of law. The record so made, of course, is subject to judicial review and in many instances results in needless appeals to the court of common pleas to secure administrative fair play and justice. Quasi-judicial bodies, such as the Board of Liquor Control, should have at least two members of the board who have been admitted to the practice of law and who have had at least five years legal experience. The hearings of the board should be conducted by one of the lawyer members of the board, who should pass upon all questions of evidence and law.

RIGHT OF APPEAL

At the present time, neither the Administrative Procedure Act nor the Ohio Liquor Control Act¹¹ require the Board of Liquor Control in appeal and citation cases to make specific findings of fact and conclusions of law in support of its orders. Repeatedly, the issuing authority in rejecting an application for a permit will give many reasons for the rejection, and upon the hearing of the appeal before the board the evidence will fail to support but one of the many reasons given for the rejection. Likewise, a citation to show cause why a permit should not be revoked may charge many violations by the licensee, and upon the hearing before the board the evidence will fail to support all of the charges. Nevertheless, the order of the board affirming the rejection of an application for a permit or the order suspending or revoking a permit will embody all of the reasons given for the rejection of the application as well as all of the charges contained in the citation. When an appeal is taken to the court of common pleas, the aggrieved applicant or permit holder is required to assume the unnecessary and burdensome task of sifting the chaff from the wheat. There is no good reason why the order of the Board of Liquor Control, either in an appeal or citation case, should not recite specifically the findings of fact established by the evidence and upon which the order of the board is based. There is nothing in the law to prevent the board from making such orders now; however, until the Act is amended, the board like other comparable administrative authorities, will not do so. Such an amendment to the Act would prevent many needless appeals to

evidence are inapplicable for administrative proceedings, see DAVIS, ADMINISTRATIVE LAW §§ 140 *et seq.* (1951); *cf.* MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 9 (1946).

11 OHIO GEN. CODE § 6064-1 *et seq.*

and expedite the appeals that are taken to the common pleas court.¹²

There are approximately 200 different types of licenses issued by the state. Some 120 are issued for a term of one year, some 56 for an indefinite term, ten are for more than one year, and two are for less than one year. Permits issued by the Department of Liquor Control are for one year. Many times in so-called citation cases, a permit holder is cited to show cause shortly before or after his permit expires. Often-times the Board of Liquor Control will hold the hearing in such case and render a decision after the permit has expired. In some cases the board will find that the charges alleged in the citation are well taken and that the permit should be revoked, but, because the permit has expired the board will issue an order reading thusly:

The board being unable to issue a revocation order which in its opinion is warranted by the said violations, the same therefore is *moot*.

The Court of Appeals of Franklin county, in a recent case,¹³ held that such an order was not appealable to or reviewable by the court of common pleas under the Administrative Procedure Act because such an order was not a final order. There is no express language in Section 154-73 of the General Code which provides that the order appealed from must be a final order as that term is commonly understood, or as the term is defined in Section 12223-2 of the General Code, pertaining to appeals under the Appellate Procedure Act.¹⁴ The word "appeal" as used in the Administrative Procedure Act is defined in Section 154-62 of the General Code. The definition of the word "appeal" includes and specifically refers to the reviewability of a finding made by an administrative adjudicatory agency. In fact, Section 154-73 of the General Code provides that a person adversely affected by any order of an administrative agency pertaining to a permit, may appeal to the court of common pleas. A so-called moot case order made by the Board of Liquor Control in and of itself adversely affects a permit holder since the order is tantamount to an order of revocation, the only difference being that no actual penalty is imposed by the board because the permit has expired. The decision of the court of appeals if upheld will effectively deny the right of appeal granted to an aggrieved permit holder by Section 154-73 of the General Code.

The enactment of the Act was not intended to establish judicial review of administrative orders measured by the same standard of finally fixed by the Appellate Procedure Act. If such were the intention

¹² MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 11 (1946).

¹³ *Corn v. Board of Liquor Control* (Ct. App. Franklin County, May 26, 1952).

¹⁴ OHIO GEN. CODE § 12223-1 *et seq.*

of the legislature, it could have incorporated the language of Section 12223-2 of the General Code directly or by reference in Section 154-73 of the General Code. The fact that the legislature did not do so should be proof enough that the appealability of an administrative order is to be governed solely by the expressed language of Section 154-73 and the definition of the word "appeal" in Section 154-62 of General Code.

If the ruling of the court of appeals is upheld by the supreme court, then it will be within the power of any licensing agency and administrative adjudicatory body, where the term of a permit is for a year or shorter duration, to deny an aggrieved permit holder the right of appeal provided by the Act. Such denial can be accomplished by citing a permit holder to appear before an administrative adjudicatory body, such as the Board of Liquor Control, before the permit expires and then holding a hearing after the permit has expired and issuing an order reciting that, if the permit had not expired, it would have been revoked for cause. If such be the law, then the Act should be amended to avoid such a crass consequence. Since the board controls its own docket, by its refusal to hear a case until after a permit has expired, it can effectively deny that which the legislature intended to give to a permit holder—the right to judicial review.

If a moot case order of an administrative adjudicatory body does not support an appeal because it is not a final order, even though it is an order issued by an administrative agency and adversely affecting a person, then the judicial review provided by Section 154-73 of the General Code provides for an idle thing and ceremony, since in most cases both an administrative and judicial review cannot be obtained during the term of a license which is of the short duration of a year or less.

The enactment of the Administrative Procedure Act was intended to give and does give every one in Ohio whose profession, trade, or business is controlled or regulated by means of a license by state administrative authority, an opportunity to secure justice and fair play through the medium of an administrative hearing, which in turn is subject to judicial review. The Act created new private rights, one of which is the right of judicial review. To deny that right by administrative delay would nullify the aim and purpose of the legislature in utilizing administrative hearing and judicial review as a means of protecting the interests and rights of applicants for licenses and licensees.

The doctrine of moot case is increasingly being asserted by administrative authorities as their defense for non-compliance with orders made by administrative adjudicatory bodies and courts in favor of persons who have been successful in appeals perfected under the Administrative Procedure Act. If the Ohio courts apply the doctrine of moot case in litigation involving short term licenses then the

administrative and judicial review provided by the Act will be meaningless, since it must be borne in mind that the commencement of proceedings to hear appeals from orders rejecting applications for permits, as well as proceedings to revoke permits, is within the sole power of the administrative agencies. Courts outside of Ohio have refused to apply the doctrine of moot case to reviews of administrative orders pertaining to licenses. The leading modern case is that of *Burke v. Coleman*.¹⁵ The defense of the doctrine of moot case by administrative authority should not be permitted to deny the rights flowing from a successful appeal obtained by an aggrieved person under the review provisions of the Administrative Procedure Act which the legislature enacted in its solicitude for persons who require state licenses in order to engage in business, trades, or professions.

The right of administrative officers and boards to appeal to the court of appeals from adverse decisions rendered by the court of common pleas in appeals filed under Section 154-73 of the General Code has been consistently questioned for some time. Recently, the Court of Appeals of Franklin county in *Barn Cafe & Restaurant, Inc. v. Board of Liquor Control*,¹⁶ held that the Board of Liquor Control and Department of Liquor Control have such right of appeal, even though the court stated that there is no expressed provision in the Act authorizing administrative authorities to appeal an adverse judgment rendered by a court of common pleas. The court held that it had jurisdiction of such an appeal because of the language in Section 154-73 of the General Code which provides that the hearing of the appeal in the court of common pleas from the administrative order "shall proceed as in the trial of a civil action." On that basis the court of appeals reasoned that all laws including the right of appeal under the Appellate Procedure Act pertaining to the trial of civil actions in the court of common pleas governed the review of an administrative order relating to a license. The reasoning of the court appears to be in conflict with what was said of the applicability of the Appellate Procedure Act to cases involving administrative orders under the Administrative Procedure Act by Judge Turner in *Farrand v. State Medical Board*.¹⁷ The court of appeals overlooked the fact that the legislature in the enactment of the Administrative Procedure Act was concerned primarily with the welfare of licensees in their relationships with state administrative authorities. The Act was not intended to give such authorities the right to appeal to higher reviewing courts whenever dissatisfied with a determination made against an agency in

¹⁵ 356 Mo. 598, 202 S.W. 2d 809 (1947); accord, *Orozowske v. Mayor, etc.*, 134 N.J.L. 566, 49 A. 2d 476 (1946); *Technical Radio Laboratory v. Federal Radio Commission*, 36 F. 2d 111, 66 A.L.R. 1355 (1929); see 42 AM. JUR. 571.

¹⁶ 63 Ohio L. Abs. 344, 109 N.E. 2d 332 (1951).

¹⁷ Note 4, *supra*.

a license matter, either by administrative adjudicatory body or the court of common pleas. The absence of enabling language in favor of administrative authorities in Section 154-73 of the General Code is not an accident or oversight when one compares that statute with the Act recommended in 1942 by the Administrative Law Commission to the 95th General Assembly, wherein it was provided that state administrative agencies be allowed to appeal from orders rendered by the proposed Administrative Board of Review to the Supreme Court of Ohio.¹⁸ Whenever the legislature has determined to grant state officers and agencies the right of appeal it has done so by expressed language.¹⁹

There is no good reason or need from a governmental standpoint why administrative authorities should have the right of appeal to a higher reviewing court from an adverse decision of the court of common pleas in a licensing matter. Outside of the very natural and human desire to be upheld or vindicated in his or its action, an administrative officer or authority cannot be affected, aggrieved, or prejudiced by an adverse order or judgment rendered by a court of common pleas in an appeal filed under Section 154-73 of the General Code. On the other hand with the unlimited wealth, resources, and power of the state, and no individual responsibility or liability for the costs or for the expense of employing legal counsel, an administrative authority with the right to appeal could engage in protracted and costly litigation to the detriment of a successful applicant for a license or licensee. The need for such a right of appeal on the part of administrative authorities vanishes when one remembers that the procedural safeguards of the Administrative Procedure Act were designed and intended to protect the citizen against the tyranny of administrative authorities empowered by law to issue, deny, suspend, and revoke licenses necessary to engage in a business, trade, and profession.

An indication of the position that the Supreme Court of Ohio may take on that question is to be found in the recent case of *DeCillo & Sons v. Chester Zoning Board of Appeals*.²⁰ The following is from the syllabus of the case:

Neither a township board of zoning appeals nor any of its members as such have a right of appeal from the judgment of a court, rendered on appeal from a decision of such board and reversing and vacating that decision.

In spite of its few shortcomings the Administrative Procedure Act

18 See S.B. No. 36, p. 16, 95th General Assembly, Regular Session (1943-1944).

19 OHIO GEN. CODE §§ 1073-34a, 1084-9 (o), 1346-4, 1345-1, 1465-90, 1182-13, 5611-2, and 13459-14.

20 158 Ohio St. 302, 109 N.E. 2d 8 (1952).

has been of untold benefit to hundreds of thousands of citizens whose livelihood and investments can be jeopardized by arbitrary, unfair, erroneous, and tyrannical actions of administrative authorities in the issuance, rejection, suspension, or revocation of licenses, and who in most instances act as accuser, prosecutor, and judge.