LEGISLATION

Advisory Boards

Advisory boards are located in the field of administrative government. This area of government is part of the executive branch. Goodnow has described it as "the activity of the government with the exception of the activity of both the legislature and the courts";[1] or, as he has expressed it in other terms, "administration is thus to be found in the manifestations of the executive action."[2] Freund[3] has said in discussing administration that the American people are content to bestow administrative powers as a supplement to legislation which they are inclined to pass as a cure for social and economic evils. It is this inclination as well as the growth of a more complex civilization that has made the field of administration so indispensable in the system of American government. Freund[3] has further stated that there is no adequate technique of administrative procedure but nevertheless he expresses confidence that such technique will be obtained in the future. Administration functions through agencies composed of officers, boards, or commissions, many of which have been established in the executive departments of our federal and state governments. These administrative agencies are the usual means of carrying out the activities of the executive branch. The advisory board is such an agency, but it is distinguishable in that its function is not to effectuate the "manifestations of the executive action," but to advise, recommend, and investigate such activities reposed in an administrative agency. However not all so-called advisory boards are limited to the above characteristics; some have been endowed not only with the privilege of advising, recommending and investigating, but also with the power to enforce their decisions. For this reason, advisory boards may be classified into two groups; the first,[4] those which are coordinate in function and subordinate in power to the

[1] Goodnow, Comparative Administrative Government, p. 1.

[2] Goodnow, Comparative Administrative Government, p. 2.

[3] Freund, The Growth of American Administrative Law, p. 39.

[4] Examples: Ohio Gen. Code 154-47; Ohio Gen. Code 710-6 *et seq.*; proposed Boyd Unemployment Insurance bill (Ohio); Ohio Gen. Code 154-39a; Ohio Gen. Code 154-45; Ohio Gen. Code 154-15. The last two statutes differ from the others in that they neither provide for mandatory boards nor for members to be appointed by the governor. Their membership as well as their existence is dependent in the one case (Ohio Gen. Code 154-45) upon the discretion of the Industrial Commission and in the other case (Ohio Gen. Code 154-15), upon the discretion of the director of the respective administrative departments exercising the power granted under the section.

ordinary administrative board, officer or commission; and the second,[5] those which are super-imposed upon the ordinary administrative board, officer, or commission.

To elaborate upon this distinction the boards in group one have duties and privileges of recommending, defining, proposing, and advising administrative agencies, but this is the extent of their function. They must resort to a sanction by public opinion to enforce their decisions. On the other hand, the second type of advisory board possesses not only the characteristics of the former but it has power as well; what it decrees, it can enforce. It is virtually independent of the executive, legislative, and judicial branches, and its discretion is apparently unlimited if it functions within the boundaries established by the law of its creation, within which it is checked only by the possibility of removal of its members for malfeasance in office.

Statutes establishing advisory boards may be considered as being in the field of special legislation. Although it is difficult to draw a line between special as distinguished from general legislation, for the purposes of definition, special legislation may be defined as legislation which limits itself to a phase of law dissociated from every other, while general may be defined as broad or comprehensive legislation applied to numerous phases of a legal field. However, whether a given statute will be classified in either the general or special area is dependent upon the perspective of the person making the differentiation; for example, it may be stated that statutes creating advisory boards are limited to the field of administrative law, therefore they may be considered special in that, out of all the branches of government, they are limited to the administrative field alone. Furthermore, if a statute creates an advisory board as does the Michigan statute,[6] which is to "exercise supervisory control over the functions and activities of all administrative departments," the statute, from a perspective of the field of administration as a whole, is general legislation; however, if a statute creates an advisory board limited to a specific phase of the administrative field as does Ohio Gen. Code 710-6, which is limited to a specific field of banking, in accordance with the above reasoning it is special legislation.

Legislation, categorically speaking, may be either regulatory or declaratory. "Where legislation operates in purely conventional terms (hours of labor, rates of interest) it is clearly regulative, where it operates within the recognized categories of misconduct it is declara-

[5] Examples: McKinney's consolidated laws of N. Y.; Title 4, Banking Law, par. 10 *et seq.*; Laws of Mich. (1929) Chap. 11, sec. 201 *et seq.*; Public Acts of Mich. (1919) No. 282.

[6] Laws of Mich. (1929) Chap. 11, Sec. 201 *et seq.*

tory."[7] Declaratory legislation pertains to subject matter which is anti-social; whereas regulatory legislation concerns subject matter which is not anti-social itself, but becomes anti-social when under certain circumstances being unregulated it assumes a nefarious aspect which results in a menace to organized society. Or, otherwise stated, declaratory legislation concerns offences *mala in se* and regulatory legislation concerns offences *mala prohibita*. "An offence *malum in se* is properly defined as one which is naturally evil as adjudged by the sense of a civilized community, whereas an act *malum prohibitum* is wrong only because made so by the statute."[8] In accordance with these distinctions, statutes creating advisory boards may be classified as regulatory. As an example of such a statute, the Ohio banking act[9] establishing an advisory board is typical. It regulates the business of banking which in itself is not an evil but when, in a laissez faire economy, it adversely exploits the interests of a great number of people dependent upon it, it becomes obnoxious and a fit subject of regulative legislation.

Some regulatory statutes are self-executing and others are not. In the New York banking statute[10] power is given the banking board "(5) to limit and regulate withdrawals of deposits and shares from * * * ." This is clearly not self-executing, but if the legislature should frame a statute declaring that all depositors who withdraw more than five hundred dollars from the bank should be fined this would be self-executing; for the moment the person breached the statute he would be *ipso facto* guilty under it. The desired result would be obtained without the aid of a board, officer, or commission to administer the statute. But under the New York statute, above, the legislature has given to an administrative agency a power to execute a statute which is not self-executing. The board then becomes a regulatory body exercising power which has been delegated to it by the legislature. This is an example of what is called deferred control or in other words, postponed control to be exercised by an administrative agency in the future.

Control may be deferred to a regulatory body in at least two ways; the first is by advance determination, the second is by corrective intervention. When the first method is employed the legislature establishes certain standards by statute and delegates a duty to an officer or another agency to see that those who are subject to the act conform to its standards. No statute creating an advisory board is of this type. When the

[7] Freund, Legislative Regulation, p. 56.

[8] *State* v. *Horton*, 139 N.C. 588, 51 S.E. 945, 1 L.R.A. (N.S.) 991; 110 Am. St. Rep. 818 (1905).

[9] Ohio Gen. Code 710-6.

[10] N. Y. Banking Laws, par. 10c.

second method is used the legislature sets up broad standards and gives to an administrative agency the power to determine in its discretion what particular behavior shall be required of persons who come within the scope of the standards. An illustration of this kind of deferred control would be a statute establishing an administrative agency such as a superintendent of banks, purchasing agent or an unemployment council, which, in its respective field, may demand that the person or persons subject to its discretion conform with its interpretation of the intention of the legislature or be subject to some disadvantage, penalty, or deprivation of a benefit. Over these administrative bodies the governor or legislature is the natural check and supervisory agency. Unlike these usual administrative bodies, *supra*, the legislature has granted to advisory boards powers of supervision and censure possessed by it or the governor. These are powers which they had themselves exercised over the administrative agencies. Thus there comes into being an apparent deferred control, reposing in an advisory board, which permits it to regulate or otherwise control a deferred power reposing in an administrative board, officer, or commission. Advisory boards, therefore, appear to be superstructures, for at the base are found the persons subject to the legislation and above these the ordinary administrative agencies and above these the advisory boards, all of which are under the control of the legislature or governor. However, at this point a line must be drawn between the advisory boards classified in group one and group two, *supra*. Of these the latter group (boards which have duties, privileges and powers) are superstructures because they are the only boards which have the complete control of the agencies beneath them. On the other hand, the former boards in group one (boards with duties and privileges but no powers) are not superstructures, but are coordinate structures functioning on the same level as the administrative agencies in this so-called hierarchy of administrative government.

A careful examination of the statutes which create the first type of advisory boards reveals that these statutes do not strictly fall within the scope of deferred control through corrective intervention. Here the delegation of what appears to be deferred control is a delegation of privilege only.[11] The boards thus being recipients if no power cannot make effective their decisions. It follows therefore that no control has been deferred, for control is "to exercise restraining or directing influence over."[12] This is illustrated by the proposed Boyd Unemployment Insurance bill of Ohio. In this act the board or advisory council as it

[11] See *Fundamental Legal Conceptions*, 23 Yale L.J., p. 38 for a discussion of powers and privileges.

[12] Webster's dictionary.

is called, has the privilege to "conduct research of its own, make public reports, and recommend to the commission, to the governor, and to the legislature needed changes from time to time." Similarly in the Ohio banking act, *supra*, there is no provision made for the enforcement of the performances of the board. To define its so-called "powers," words are used such as "to advise" and "recommend," "to propose," "to consider," and "to submit." Only in paragraphs[13] (4) and (5) of Ohio Gen. Code 710-6a is there any semblance of power. By these sections the board may define an emergency under 710-86 and permit the establishment of branch banks without compliance with 710-37.

A similar examination of the second group of statutes reveals that they also do not fall within the classification of legislation by deferred control through corrective intervention. For in them the legislature has established broader standards than it usually does in the case of deferred control by corrective intervention. It has enacted a broad declaration of policy or has delegated to the boards certain powers which in substance are declarations of policy. The boards have been permitted to work out their own procedure and exercise their own discretion as they see fit in achieving these ends. Quoting from the New York banking act:[14] For the purpose effectuating the policy declared in 10a [* * * business of all corporations and persons subject to the banking law shall be supervised and regulated * * * to insure the safe and sound conduct of such business * * * to prevent hoarding of money, to eliminate unsound and destructive competition * * * and thus to maintain public confidence in such business and protect the public interests and the interests of depositors, creditors, and stockholders] the banking board shall have powers by a two-thirds vote of its members to make and amend rules and regulations not inconsistent with law." Continuing in the act we find "without limiting the foregoing power, uses and regulations may be made for the following purposes * * * (4) To prescribe from time to time (a) rates of interest, if any, which may be paid on deposits with banks, trust companies, private bankers, industrial bankers, and other corporations or agencies thereof subject to the law." In this statement it appears that the legislature has completely delegated to the board its own power of establishing standards of interest rates. This is a true delegation of control for when the board acts, its act is mandatory; nor need it resort to sanction by public opinion

[13] Ohio Gen. Code 154-39a establishing a building and loan advisory board is almost identical to this statute creating the banking advisory board, Ohio Gen. Code 710-6, *et seq.* with the exception of paragraphs (4) and (5) of Ohio Gen. Code 710-6a.

[14] N. Y. Banking Laws, par. 10c.

for enforcement of its acts as would be the case if it were a recipient of a mere privilege. It is even given power by a two-thirds vote to dismiss from employment any disobedient director, trustee, or officer who is subject to the act. The act provides that if he continues in such office thereafter, he shall be guilty of a misdemeanor. (This latter provision, it may be noted, is self-executory). This type of statute creates a deferred control which may be employed by a board practically independent of restraint and supervision. In this respect it transcends corrective intervention and is similar to another form of deferred control described as regulation by organization. In this type the state, instead of doing the regulating itself, establishes in the form of an organization the necessary machinery of self governing. However, although this statute may not coincide completely with what may be termed deferred control by organization it approaches it, in that in a separate field such as banking it regulates a complete unit without interference.

An examination of the composition of these boards discloses an interesting application of the technique employed to select a personnel best fitted for the tasks before it. Under the New York and Ohio banking laws, *supra*, the members of the boards are chosen with the greatest of care. Both of these acts require the respective boards to be made up of members from definite banking groups. The New York law goes so far as to require that the banks of these respective groups nominate the members to the board by preferential ballot. The object of this is to assure that a representative group of bankers as well as men who are familiar with the banking business will regulate this branch of administrative government. The advisory board for purchasing[15] is made up of stewards from the various state institutions. Here again the personnel is chosen with the purpose that members shall be fitted for their tasks. In the proposed Boyd Unemployment Insurance bill in Ohio the same thing is sought. Over and above the unemployment commission is placed an advisory council. Members of it are chosen from employers, employees, and other stated professional groups. In all these statutes it is clear that the major purpose of the legislatures is to procure a board fitted to understand the respective phase of administrative government in which it is associated.

In most cases the legislatures have not appropriated fixed salaries for the members of advisory boards.[16] Members' compensation is limited to necessary expenses. For this reason it is supposed that persons who seek to serve on the board will not be enticed by large salaries and that

[15] Public Acts of Mich. (1919) No. 282.

[16] Ohio Gen. Code 710-6; Public Acts of Mich. (1919) No. 282; McKinney's Consolidated Laws of New York, Bk. 4, Banking Law, par. 10 *et seq.*

appointment to membership will not be based on political patronage. But on the other hand there may be those who are attracted by power which may be wielded for their own selfish benefits. Expense accounts may even be fabricated. To thwart this possibility it has been suggested that acceptance by an appointee of a position on the board be made mandatory. With this provision in addition to the provisions already included in the statutes, the boards ought to be composed of a competent membership. As an added check, the legislatures have also provided for sufficiently long terms and appointments in rotation so that one political administration can not during any one period exert too much influence on the board.

A board to be truly advisory must in a great part be free from restrictions and restraints. If one is controlled in the advice he gives it is no longer his advice. Therefore an advisory board must function as its own initiative dictates. For that reason it can not assure an effective attainment of its objectives, because its success in a great part is dependent on its personnel. The advisory board is no panacea of all administrative defects but is a valiant attempt to shear the administrative department of its potential inherent deficiencies.

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MORTGAGES

PAROLE RELEASE OF AN EQUITY OF REDEMPTION

On March 1, 1916, Mungeon Cooney delivered to the plaintiff, Frederick Orth, a mortgage on certain real estate. Cooney died testate in 1920, leaving all his property to his widow, and appointing her executrix. In 1927 the widow died intestate leaving her son, Wayne Cooney, her sole heir. Apparently the condition of defeasance within the mortgage was broken by the failure to meet interest payments, although such payments were made by Wayne Cooney up to March 1, 1931. In 1934 Orth and Wayne Cooney made an oral agreement whereby the mortgagee was to accept a release of the equity of redemption in return for the cancellation of the mortgage indebtedness. When the deed was tendered, Orth refused to accept it and later filed an application as creditor of Mungeon Cooney for letters of administration *de bonis non* of the estate of Mungeon Cooney. This application was denied in the Probate Court of Hardin County and allowed on error to the Common Pleas Court. The Court of Appeals reversed the judgment of the Common Pleas Court and affirmed that of the Probate Court. The Appellate Court held that an executory parol contract is