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ADMINISTRATIVE LAW - FAIR LABOR STANDARDS ACT - POWER OF ADMINISTRATOR OF WAGE AND HOURS DIVISION TO DELEGATE AUTHORITY TO ISSUE SUBPOENA DUCES TECUM TO SUBORDINATES

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RECENT DECISIONS

ADMINISTRATIVE LAW — FAIR LABOR STANDARDS ACT — POWER OF ADMINISTRATOR OF WAGE AND HOURS DIVISION TO DELEGATE AUTHORITY TO ISSUE SUBPOENA DUCES TECUM TO SUBORDINATES — The Regional Director of the Wage and Hour Division, pursuant to authority delegated to him by the administrator,[1] signed and issued a subpoena duces tecum ordering petitioner to produce its books and records which were to be used in investigating the wages and the hours of petitioner's employees. After petitioner had failed to comply with this subpoena, the administrator applied to the district court for an order requiring the petitioner to appear and show cause why it should not obey the subpoena duces tecum. This order was issued by the district court, and petitioner appealed after the district court refused to dismiss the proceedings. The circuit court of appeals affirmed the findings of the district court, and appeal was made to the Supreme Court. *Held,* the proceedings should be dismissed since the Administrator of the Wage and Hour Division has no authority under the Fair Labor Standards Act to delegate the power to issue a subpoena duces tecum to subordinate officials. *Cudahy Packing Co. v. Holland,* (U. S. 1942) 62 S. Ct. 651, affg. (C. C. A. 5th, 1941) 119 F. (2d) 209.

The Supreme Court recently decided, in *Montgomery Ward v. Fleming* (March, 1941),[2] that the Wage and Hour Division could issue subpoena duces tecum to compel employers to produce records of the wages and the hours of their employees without violating the constitutional guarantee against "unreasonable searces and seizures."[3] Although several federal courts[4] held that the administrator could delegate this authority to the regional and acting regional directors, such power is denied by the Supreme Court in the principal case.[5] This decision ignores the clear import of section 4(c) of the Fair Labor Standards Act, which provides that "The principal office of the Administrator shall be in the

[1] Administrative Order No. 48, issued by the Administrator of the Wage and Hour Division of the Department of Labor, published in 5 FED. REG. 1586 (April 27, 1940), authorized regional directors, acting regional directors, and territorial representatives to issue subpoenae duces tecum in connection with investigations.

[2] 311 U. S. 690, 61 S. Ct. 71 (1941). It is now settled that if a valid regulatory power is being exercised and subpoenae duces tecum are necessary for investigative purposes, the "unreasonable search and seizure" clause of the Federal Constitution is no bar to their being issued by administrative agencies. See 26 WASH. L. Q. 531 (1941).

[3] U. S. Const., Art. IV.

[4] Fleming v. Easton Publishing Co., (D. C. Pa. 1941) 38 F. Supp. 677; Fleming v. Arsenal Building Corp., (D. C. N. Y. 1940) 38 F. Supp. 675; Fleming v. Lowell Sun Co., (D. C. Mass. 1940) 36 F. Supp. 320, reversed (C. C. A. 1st, 1941) 120 F. (2d) 213, cert. granted (U. S. 1941) 62 S. Ct. 112. It was because of the conflict between the circuit court of appeals decisions in the Lowell Sun case and in the principal case that certiorari was granted. 62 S. Ct. 651 at 653. On the day following its decision in the principal case, the Supreme Court affirmed per curiam, by an equally divided court, the circuit court of appeals decision in the Lowell Sun case. Holland v. Lowell Sun Co., (U. S. 1942) 62 S. Ct. 792.

[5] Justices Douglas, Black, Byrnes and Jackson dissented from the majority opinion in the principal case.

District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." [6] The Court reasons that since some of the administrator's powers, by their very nature,[7] must be exercised by the administrator himself, Congress did not intend that any of his powers could be delegated unless expressly provided in the statute. A more reasonable interpretation of section 4(c) would permit those powers which can be more efficiently exercised by the directors of the local districts to be delegated, while denying delegation of those powers which demand attention from the head of the agency. Such an interpretation is more consistent with the provision of the act enabling the administrator to appoint such local employees as may be needed to carry out the purposes of the act,[8] for a subpoena should be issued only by officials conversant with the details of the matter under investigation rather than by the administrator, who may be distant from the scene of investigation and only vaguely familiar with its details.[9] The interpretation given the statute in *Fleming v. Easton Publishing Company* [10] precludes an abusive use of the sub-

[6] 52 Stat. L. 1060, § 4(c) (1938), 29 U. S. C. (Supp. 1939), § 204(c).

[7] The Court mentions the powers given to the administrator to appoint industry committees and the chairmen thereof, to approve or disapprove their reports, to provide for employment of learners and handicapped workers, as examples of those powers which could not be delegated to subordinates.

[8] 52 Stat. L. 1060, § 4(b) (1938), 29 U. S. C. (Supp. 1939), § 204(b).

[9] S. Doc. 10, 77th Cong., 1st sess. (1941), pt. 1, p. 33, note 61 (Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Monograph on the Administration of the Fair Labor Standards Act). The committee concludes that if subpoenae duces tecum can only be issued by the administrator, the act should be amended because of the cumbersome procedure involved if the burden of issuing these subpoenae is placed on the administrator, who is unfamiliar with the details of the investigation. In Inland Steel Co. v. National Labor Relations Board, (C. C. A. 7th, 1940) 109 F. (2d) 9 at 19, Circuit Judge Major said concerning the National Labor Relations Act: "Under the procedure followed, petitioner was required to make application for subpoenas, not to the Examiner or a Regional Director, but to the Board or a member thereof in Washington, specifying the 'name of the witness and the nature of the facts to be proved by him.' How the Board in Washington, or a member thereof, could be in a position to determine the materiality of 'the nature of the facts to be proved,' especially where the issues were as numerous and complicated as they were in the instant case, it is difficult to understand." According to the Attorney General's Committee on Administrative Procedure, supra, this procedure has proved so cumbersome in the Labor Board proceedings that the board signs subpoenae in blank to be issued by the trial examiners during the trial in accordance with general instructions given by the board, but the defendant has no such convenient source at his disposal.

Justice Douglas, in his dissenting opinion in the principal case, 62 S. Ct. at 657, says: "The Administrator in Washington can hardly exercise an independent judgment as to what the range or course of a particular investigation should be in remote Alaska or Puerto Rico. At least he cannot do so unless the processes of law enforcement are to come to a standstill."

[10] (D. C. Pa. 1941) 38 F. Supp. 677. The court said that it was clear, in view of the multiple duties imposed on the administrator, that the legislature intended the power to issue subpoenae duces tecum could be delegated, but since the power must be closely guarded, Congress did not intend that the power could be delegated to an attorney

poena duces tecum, since the court there held that only a reasonable delegation of authority was intended and that the right to issue subpoenae duces tecum could only be delegated to the regional directors and acting regional directors who are directly responsible to the administrator. Furthermore, the history of the bill in Congress indicates that this power was intended to be delegated since the original Senate bill provided for delegation of the power to issue subpoenae duces tecum and the final bill as approved by the Joint Committee of both Houses contained section 4(c), which none of the original drafts had included.[11] Since section 11(a)[12] provides that the administrator or his duly authorized representative can make investigations necessary for the purposes of the act, the Court in the principal case decided that section 4(c) was not intended to authorize delegation of authority by the administrator because the words "or his duly authorized representative" would then be surplusage. A better interpretation would be that, since the investigatory power is the type of power that should be delegated, the inclusion of these words is merely reiterating the policy expressed in section 4(c) of allowing delegation of those powers that can be best exercised by the local representative of the division. The Court's interpretation would lead to the untoward result of the administrator having to perform all the other powers given him by the act, since only section 11(a) mentions that the duly authorized representatives as well as the administrator may exercise the powers granted.[13] In view of the multiple duties of the administrator, such a result shows the fallacy

of the local office but only to the regional director or acting regional director both of whom are directly under the control of the administrator.

[11] See H. REP. 1452, 75th Cong., 1st sess. (1937); H. REP. 2182, 75th Cong., 3d sess. (1938); S. REP. 884, 75th Cong., 1st sess. (1937). The bill proposed by the House of Representatives did not contain any provision for the power to delegate authority to issue subpoenae duces tecum, but this proposed plan was structurally different in that the Secretary of Labor occupied the position held by the administrator in the act as adopted.

[12] 52 Stat. L. 1060, § 11(a) (1938), 29 U. S. C. (Supp. 1939), § 211(a): "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act. . . ." Since this section does not expressly say that the powers of investigation may be delegated, the argument of the Court in the principal case that since this section expressly provides for delegation of this power, Congress only intended powers to be delegated if the act expressly provided for this loses much of its force. A more logical interpretation of this section would be that the inclusion of the words "or his representative" was merely expressing what was already implicit in the act in section 4(c).

Justice Black in his dissenting opinion in the principal case, 62 S. Ct. at 658, said: "Hence, in view of the nature of the Administrator's functions and the fact that the power to make investigations can be delegated, the lesser but companion power to delegate the issue of subpoenas should be implied as an incident of the office."

[13] See 52 Stat. L. 1060, §§ 4-14 (1938), 29 U. S. C. (Supp. 1939), §§ 204-214, for the multiple duties imposed on the administrator by the act. The only provision which says that the "Administrator or his authorized representative" may perform these duties is § 204 (c), so that if the Court's view in the principal case is accepted, all other duties of the administrator would have to be performed in person by him.

of the Court's interpretation of the statute.[14] Several other governmental agencies have been permitted to delegate the power to issue subpoenae duces tecum,[15] even though in some instances, such as the Federal Power Commission Act, it is arguable that the statute does not authorize such delegation.[16] It would seem, therefore, that viewed purely as a matter of statutory interpretation the decision of the Supreme Court in the principal case is erroneous.

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[14] In the opinion of the district court in the Lowell Sun case, Judge Ford said: "Congress evidently did not intend that the Administrator would perform all the duties that were required by the Act, and the language of Section 4 (c) gives ample authority to permit the Administrator to delegate to an Acting Regional Director authority to sign such a subpoena as we are concerned with here, in order to obviate delay and expense and to lighten, in part, the burden imposed upon the Administrator in the performance of his multiple duties under the Act." Fleming v. Lowell Sun Co., (D. C. Mass. 1940) 36 F. Supp. 320 at 326.

[15] The circuit court of appeals in the Lowell Sun case, (C. C. A. 1st, 1941) 120 F. (2d) 213 at 216, note 2, mentions that the commission or administrator in the Federal Trade Commission, Civil Service Commission, Board of Tax Appeals, and National Labor Relations Board are not authorized to delegate the power to issue subpoenae duces tecum while this power may be delegated in the Securities and Exchange Commission, Federal Power Commission, Tariff Commission, United States Maritime Commission, and Federal Communications Commission. It is interesting to note that both in the Tariff Commission Act, 46 Stat. L. 699 (1930), 19 U. S. C. (1934), § 1333, which the Court in the principal case says permits delegation, and in the Federal Trade Act, 38 Stat. L. 722 (1914), 15 U. S. C. (1934), § 49, which does not permit delegation, the granting clauses are exactly the same: "Any member of the commission may sign subpoenas, and members and agents of the commission, when authorized by the commission, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence."

[16] Federal Power Act, 49 Stat. L. 856 (1935), 16 U. S. C. (Supp. 1939), § 825f (b): "For the purpose of any investigation or any other proceeding under this Act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements or other records which the Commission finds relevant or material to the inquiry." Since the commission must find that the records to be subpoenaed are material and relevant, the courts might interpret this to mean that only the commission could issue subpoenae duces tecum. Since the Court in the principal case, 62 S. Ct. at 656, note 11, states that the Federal Power Commission has the power to delegate the authority to issue subpoenae duces tecum, it would seem that the Court would also interpret liberally the Fair Labor Standards Act so as to give the administrator this power. On the interpretation of the Federal Power Act, see S. Doc. 10, 77th Cong., 1st sess. (1941), pt. 12, p. 35 (Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Monograph on the Federal Power Commission).