Michigan Law Review

Volume 37 | Issue 4

1939

ADMINISTRATIVE LAW - SEPARATION OF POWERS - DELEGATION OF EXECUTIVE FUNCTIONS TO THE JUDICIARY

Collins E. Brooks
University of Michigan Law School

RECENT DECISIONS

ADMINISTRATIVE LAW — SEPARATION OF POWERS — DELEGATION OF EXECUTIVE FUNCTIONS TO THE JUDICIARY — Plaintiff applied to the county board of public welfare for a pension award under a state Old Age Assistance Act.[1] In conformity to the act, an investigation was made by the county board and the facts were submitted, with a recommendation for an award, to the State Department of Public Welfare for approval. The latter, however, overruled the award, whereupon plaintiff applied to the circuit court for a trial de novo, as provided for by the statute, and was successful. On appeal from the court's order allowing the award, *held*, the statutory provision for a de novo review by the circuit court was an unconstitutional attempt to delegate executive power to the judiciary. *Borreson v. Department of Public Welfare*, 368 Ill. 425, 14 N. E. (2d) 485 (1938).

While many of the powers and functions exercised by the three great departments of government easily may be classified either as executive, or legislative, or judicial, there is an ever-increasing number of so-called "borderline" powers and functions which do not admit of arbitrary or dogmatic classification because they combine aspects of two, or perhaps all three, types of power.[2] Increasingly is this true with the rapid growth and development of administrative boards and commissions. To classify these powers is no easy task,[3] especially when the constitutionality of some statute may depend on that classification under the doctrine of separation of powers. Certainly this may be said of the power sought to be conferred in the instant case.[4] Clearly there are aspects of judicial power in the function sought to be conferred on the circuit court.[5]

[1] Ill. Rev. Stat. (1937), c. 23, §§ 410-430.

[2] State ex rel. Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N. W. 929 (1928). See also, The FEDERALIST, No. XLVII, by James Madison (1788).

[3] See In re Appointment of Revisor of Statutes, 141 Wis. 592 at 597, 124 N. W. 670 (1910), where Chief Justice Winslow expressed the following view: "It is easy to give general definitions of the three great governmental powers. The legislative power is the power which makes the laws; the executive, the power which enforces them; and the judicial, the power which expounds and applies them. Would that it were as easy to apply these general definitions to a concrete case! It is familiar to all who have considered the subject at all that between these several powers which seem so distinct in their general character, there are great borderlands of power which may be said to approach nearer and nearer until they merge gradually into each other. In these borderlands it is often difficult to tell where one power ends and the other begins."

[4] It should be noted at the outset, however, that the problem is quite different from the ordinary one of determining whether an executive agency is exercising judicial power. Because a power or function is sufficiently executive to admit of its exercise by an executive agency, it does not follow that the particular power is so essentially executive that it cannot be exercised by the judiciary, and many of the arguments applicable to the former situation are not equally cogent where applied to the latter.

[5] Among the attributes commonly associated with judicial power, many are found in this proceeding. There are, for example, a hearing and deciding of a controversy between adverse parties, a binding decision (subject, of course, to review by a higher

That there are two parties with very real and antagonistic claims cannot well be doubted. The issue to be determined is defined by the act, which stipulates the fact situations under which relief may be granted.[6] In order to determine the case, the court must try issues of fact arising between the parties, and apply the rules and standards set down by the legislature, or by the administrative agency under the power delegated to it by the legislature.[7] But, it is argued, those functions are merely part of the administrative process and are not judicial in nature. The chief argument of the court in the principal case centers around this point, the trial de novo feature bearing the chief brunt of the attack. By this provision, it is said, is sought to be conferred on the court a sort of concurrent jurisdiction with that of the administrative agency, with the court's function merely a duplication, in effect, of that vested in the department. It appears to this writer, however, that too much stress is thus laid upon the de novo feature. As is pointed out in the dissenting opinion, the circuit court cannot hear the case until the department has passed on the application. Fundamentally, it would seem, the purpose of the provision is really to provide for judicial review of the action of the department. A possible introduction of additional evidence would not seem to mark the proceedings as exclusively executive.[8] The court further argues that since the department may change the ruling at a later date on the

court), an effect on personal rights, the use of ordinary court procedure and machinery, and the fact that the power of the court may be exercised only on application of an aggrieved party. While Pillsbury, in "Administrative Tribunals," 36 HARV. L. REV. 405, 583 (1923), points out that these features are not conclusive, it must be admitted that they are judicial in nature. Further, the distinction pointed out in note 4, supra, should be borne in mind.

[6] Under the act, any person is entitled to assistance who has attained the age of 65 years; has resided in Illinois for a specified period prior to the filing of his application; is a citizen of the United States; is not an inmate of, or maintained by, any municipal, county, state, or national institution, but such persons may apply for assistance to be granted on their leaving the institution, and for one month prior thereto; has not assigned property within five years prior to his applicaton for aid, for the purpose of qualifying for assistance, or of increasing his need for assistance; has not sufficient income to provide reasonable subsistence compatible with decency and health, such reasonable subsistence not to exceed $30 per month; has no children who, in the opinion of the state department or the attorney general, are legally responsible for his support; has such children, but only during the time they are not actually supporting him (and there are provisions for recovery of monies so advanced, from such children); and, if an inmate of a private institution, has not purchased such maintenance, or whose funds for such purpose have entirely been consumed.

[7] It would seem, therefore, to fit the often-quoted definition by Justice Holmes, in Prentis v. Atlantic Coast Line Co., 211 U. S. 210 at 226, 29 S. Ct. 67 (1908), as follows: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and its end."

[8] People ex rel. Manhattan Ry. v. Barker, 152 N. Y. 417, 46 N. E. 875 (1897); People ex rel. Thomson v. Feitner, 168 N. Y. 411, 61 N. E. 763 (1901); Duluth v. Railroad & Warehouse Commission, 167 Minn. 311, 209 N. W. 10 (1926); See also, FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 278-280 (1928).

basis of a change in circumstances, or since a county board may revoke the order for cause, the court's decision is not final, and the process is not, therefore, judicial.[9] It is submitted, however, that the court's decision is final, subject, of course, to review by a higher tribunal, on the facts as they exist at the time of the trial. A change of order, or revocation thereof, may take place only on a change of circumstances or for cause. Such procedure is not an overruling of the court's decision, but an entirely new decision based on new facts. The argument has been made in situations somewhat similar to that presented by the principal case that where the "right" of the individual sought to be litigated is really a mere gratuity or bounty of the state, the determination is properly an administrative function.[10] This approach, however, appears most unfortunate.[11] The nature of the function, not that of the right, should be controlling.[12] In view of the many judicial attributes forming an integral part of the proceedings in question, it is believed the act is not so clearly unconstitutional as to require the decision reached by the court.

Collins E. Brooks

[9] "It is the essence of a judicial determination that it shall, so long as unreversed, and not vacated, be conclusive as to the matters involved in the controversy. . . ." City of Galesburg v. Hawkinson, 75 Ill. 152 at 157 (1874), cited by the court in the principal case.

[10] See Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 at 282 (1935); United States v. Ferreira, 13 How. (54 U. S.) 40 (1852); Carolina Glass Co. v. State, 87 S. C. 270, 69 S. E. 391 (1910); Decatur v. Paulding, 14 Pet. (39 U. S.) 497 (1840). The cases cited uphold administrative determination in such matters.

[11] See argument by Brown, "Administrative Commissions and the Judicial Power," 19 MINN. L. REV. 261 at 285 (1935).

[12] It is well settled that laws should not be declared invalid unless the conflict with the constitution is clear beyond a reasonable doubt. Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853). And see concurring opinion of Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 S. Ct. 466 (1936).