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ADMINISTRATIVE LAW-DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE TRIBUNALS

NOTE AND COMMENT

ADMINISTRATIVE LAW—DELEGATION OF LEGISLATIVE POWER TO ADMINISTRATIVE TRIBUNALS.—Thirty years ago it was generally said and believed that no part of the legislative power could be delegated to any other department of government or to any administrative officer or officers.[1] That was a fundamental principle of constitutional law thought essential to the integrity and maintenance of the system of government established by the constitution.[2] But as social and industrial problems became more complex, calling for an ever greater amount of governmental regulation, legislative bodies found themselves unable to attend to the ever increasing volume of technical detail. Furthermore, the nature of the problems was often such as to require expert

[1]Wayman v. Southard, 10 Wheat 1; State v. Great Northern Railway, 100 Minn. 445, 111 N.W. 289; Dowling v. Lancashire Insurance Co., 92 Wis. 63, 65 N.W. 738; COOLEY, CONSTITUTIONAL LIMITATIONS, 7th ed. p. 163.

[2]Dowling v. Insurance Co., supra.

training. Thus Congress and the state legislatures found themselves compelled to delegate certain duties to bodies of experts especially created and empowered for that particular work. By 1915 administrative officers were, by legislative authority, deciding what was and what was not inferior tea;[3] they were abating unreasonable obstructions to navigation;[4] they were creating and enforcing rules necessary for the preservation of the national forests;[5] they were censoring movie films which in their opinion were not moral, educational, amusing, and harmless;[6] they were fixing the rates to be charged by public service corporations;[7] they were doing all these things and many more.

When the statutes delegating these powers and duties were attacked as unconstitutional delegations of legislative power, the courts uniformly held that the powers delegated were really not legislative in any true sense but only administrative.[8] The general rule worked out was that the legislature might delegate to administrative officers the power to carry out the details of applying the law to particular situations provided that the legislature had laid down a general rule of acting fixing a primary standard for the guidance of the administrative officers.[9] It was said that the fundamental rule, against the delegation of legislative power remained and that the application of the principle laid down by the legislature was simply administrative.[10] It was often found, however, that the subject matter and purpose of the act would not admit the application of any except the most general standard; to prescribe a definite rule of action would often in effect result in the prescription of the rules and regulations themselves, which was the very thing sought to be avoided by the delegation of power to the administrative tribunal. Under such circumstances the federal courts and the most progressive of the state courts adopted what has been called the functional interpretation of the constitution.[11] These courts held that if there is a great social need for the legislation and the standard is as definite as it is practical and possible to frame it, the law is constitutional. Under circumstances which do not permit a more definite standard

[3]Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349.

[4]Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367.

[5]United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480.

[6]Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230, 35 Sup. Ct. 387.

[7]Trustees of Saratoga Springs v. Saratoga Gas, Light, and Power Co., 191 N. Y. 123, 83 N.E. 693; Stone v. Loan and Trust Co., 116 U. S. 307, 6 Sup. Ct. 334; Minneapolis, St. P. S. Ste. M. R. v. Railroad Commission, 136 Wis. 146, 116 N.W. 905.

[8]Field v. Clark, 143 U. S. 649, 12 Sup. Ct. 495; Inter Mountain Cases, 234 U. S. 476, 34 Sup. Ct. 986; Trustees of Saratoga Springs v. Saratoga Springs Gas, Light. and Power Co., supra; Union Bridge Co. v. United States, supra; Buttfield v. Stranahan, supra.

[9]State Racing Commission v. Latonia Agricultural Association, 136 Ky. 173, 123 S. W. 681; United States v. Grimaud, supra; Blue v. Beach, 155 Ind. 121, 56 N.E. 89; 28 HARV. L. REV. 95.

[10]Louisville H. & St. L. Railway Co. v. Lyons, 155 Ky. 396, 159 S. W. 971; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334; Delaware and Hudson Co. v. United States, 5 F.(2d.) 831; State v. Atlantic Coast Line, 56 Fla. 617, 47 So. 969; also see cases cited in note eight.

[11]Bridge Co. v. United States, supra; Buttfield v. Stranahan, supra. The theory that a standard of action must be set up by the legislature for the administrative officers to follow in order to avoid an unconstitutional delegation of legislative power originated in the federal courts and was subsequently adopted from them by the state courts. Now, the federal courts show extreme liberality in finding a suitable standard while most of the state courts are more conservative.

the legislatures have often contented themselves with the establishment of a standard of reasonableness. Such a standard the courts have in many cases upheld.[12] Where the delegation of power relates to a business of a character tending to be injurious or dangerous to public welfare the courts frequently do not require a standard.[13] But it has been insisted that in all other cases the legislature must lay down some standard, otherwise it becomes necessary for the administrative officers to formulate their own policy, which involves the exercise of legislative discretion, and is therefore unconstitutional.[14]

The law was in this condition in July, 1928, when Judge Rosenberry of the supreme court of Wisconsin handed down one of the most sensible, well considered, and clarifying opinions on the situation that has ever been rendered.[15] A Wisconsin statute required the use of a standard insurance policy and gave the state insurance commissioner power to disapprove any and all rules and regulations submitted to him which did not meet with his notion of what the rules and regulations ought to be. No general standard of action was provided for his guidance. This in practical effect gave the insurance commissioner power to prescribe the rules and regulations of the Wisconsin standard insurance policy. The court frankly admits that here it is dealing with a delegation of legislative power. The court says, "If an administrative officer has the authority to do the very thing that Congress might have done in the exercise of its legislative power, it is difficult to see how it can be said that the power exercised is in one case legislative and in the other case it is not. The regulation prescribes a rule of future conduct, compliance with which may be enforced in a court of law. An act of Congress can do no more, and, if in making the rules the administrative officer may be vested with discretion as to what the regulation shall be, then the two acts become identical." Judge Rosenberry points out that the delegation of legislative power is inevitable. He holds that it has been sustained over and over again by the courts even though not openly recognized as a delegation of legislative power. To quote from the opinion, "The power of making rates for public utilities is sustained upon the theory that it is a fact finding operation, that there is one just and reasonable rate, and that it is the duty of the administrative agency to discover that as a matter of fact, and therefore, in fixing the rate, the

[12]Bridge Co. v. United States, supra; Avent v. United States, 266 U. S. 127, 45 Sup. Ct. 34. In Trustees of Saratoga Springs v. Saratoga Light, Gas, and Power Co., supra, the administrative officers were directed to act "according to law" and the court held that meant reasonably. The standard of reasonableness, though indefinite in itself, has acquired considerable legal definiteness by its use in the common law.

Where the delegation of power is necessary for the protection of the public morals and general welfare and a general rule is difficult or impracticable, the courts generally do not require a definite standard. Racine v. District Court, 39 R. I. 475, 98 Atl. 97; Buffalo v. Hill, 79 App. Div. 402, 79 N. Y. S. 449; Arms v. Ayer, 192 Ill. 601, 61 N.E. 851; Forman v. State Board of Health, 157 Ky. 123, 162 S.W. 796. In all these cases, however, the courts acted upon the presumption that the administrative officers will and are bound to act reasonably—an unexpressed implication of the standard of reasonableness.

[13]State v. Sherow, 87 Kan. 235, 123 Pac. 866; State v. Montgomery, 177 Ala. 212, 59 So. 294. See the note in 12 A. L. R. 1453 for other cases.

[14]A statute or ordinance vesting arbitrary discretion in a public officer without prescribing a definite rule for his guidance is unconstitutional. See Moy v. Chicago, 309 Ill. 242, 140 N.E. 845; Shreveport v. Herndon, 159 La. 113, 105 So. 244.

[15]State ex rel. Wisconsin Inspection Bureau v. Whitman, 220 N.W. 929.

administrative agency does not do so in the exercise of legislative power, although it does the exact thing that the legislature itself might do. If, when the legislature does it, it is an exercise of legislative power, then it must be the exercise of legislative power when the interstate commerce commission does it, unless it be true that men gather 'thistles from fig trees.'"

The court is not willing to say that all legislative powers may be delegated. "The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits in which the law shall operate—is a power which is vested by our constitution in the legislature, and may not be delegated." If this function be exercised by the legislature the court will not demand a definite, expressed standard of action for the guidance of the administrative officers in the exercise of the delegated powers. The court pointed out that the matter dealt with in this particular statute did not admit of the application of any except the most general standard. And, "While the statute does not in terms provide that the commissioner of insurance shall exercise a sound and reasonable discretion, that condition is necessarily implied. It has been said many times, in many cases administrative officers or bodies must act, not only within the field of their statutory powers, but in a reasonable and orderly manner. The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness." These sentiments of the court are quite different from those expressed by the same court thirty years ago. Then the court said, "The law must be complete in all its terms and provisions when it leaves the legislative branch of the government and nothing must be left to the judgment of the board, so that, in form and substance it is a law in all its details."[16]

It is believed that this opinion of Judge Rosenberry will do much to clarify the status of administrative law in the United States. The opinion is not unusual in its attitude toward the delegation of legislative power. In the past twenty years other cases have completely destroyed the old significance of that doctrine and have created and undermined the theory of an expressed standard of action.[17] But the opinion is unusual in that it frankly recognizes the situation as it exists, that is, that certain legislative powers may be and must be delegated, and that the function of the administrative tribunal is not merely that of fact finding but amounts to an actual exercise of a fraction of the legislative function. This opinion gives "administrative law its rightful place in our legal theory."

H. N.

[16]Dowling v. Insurance Co., supra.

[17]Recently the Supreme Court has held that Congress may give the secretary of labor power to deport all aliens whom he finds "undesirable residents." Mahler v. Eby, 264 U. S. 32, 44 Sup. Ct. 283. It has also been held that a railway commission may issue or refuse permits to engage in that business at its discretion. No standard was prescribed for their guidance. Ex parte Kreutzer, 187 Wis. 463, 204 N.W. 595. Also a state insurance commissioner may review insurance rates. Henderson v. McMasters, 104 S. C. 268, 88 S. E. 645.