Michigan Law Review

Volume 57 | Issue 1

1958

Cooper: *The Lawyer and Administrative Agencies*

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RECENT BOOKS

THE LAWYER AND ADMINISTRATIVE AGENCIES. By *Frank E. Cooper.* Englewood Cliffs, N.J. Prentice-Hall. 1957. Pp. xx, 331. $7.50.

Some books are written especially for scholars; others are written primarily for practitioners. This is a scholarly work of equal interest and value to students and practicing lawyers. The author is one of the leading authorities on administrative law in the United States. He has combined the teaching of administrative law with active practice in this specialized field. And he has found time to publish books and articles on various aspects of administrative law, with particular emphasis upon practice before state administrative agencies.

This book, as the title suggests, discusses frankly and realistically the problems facing the lawyer in handling cases before administrative bodies. At the outset, Mr. Cooper emphasizes fundamental differences between court trials and administrative adjudications. He points out that, unlike courts, administrative agencies have a genuine interest in the outcome of the cases pending before them, and do not approach the administrative proceeding with the impartiality which is characteristic of the judicial process.

> "From the viewpoint of trial counsel appearing before an agency, the chief point is that he must always bear in mind the element of agency interest. Though it seldom appears in the record, it is always an important element in the decision."

Mr. Cooper suggests that this "interest in the outcome" may take on even greater significance in view of the broad discretion which is commonly conferred upon administative agencies. Under the guise of "discretion," agencies may relax procedural standards, decide cases without a full hearing, and render decisions which are not consistent with statutory authorization. Agencies may even adopt procedures which they feel are best suited to serve the exigencies of the particular case. "The practical implications of this truism must not be overlooked. The agencies never forget them, and the attorney appearing before the agencies cannot afford to do so."

From the premises of agency interest and agency discretion, Mr. Cooper appraises the role of the lawyer in administrative proceedings. He concludes that effective representation before agencies must take realistic account of the peculiarities of the administrative, vis-a-vis the judicial, process. "The moral, from the standpoint of the attorney, is obvious. He must eschew technical, legalistic arguments that the agency will view with impatience as meaningless roadblocks on the path of progress. He must convince the agency that the result he desires is in accordance with the policy that the agency seeks to promote."

Mr. Cooper logically analyzes the whole process of agency adjudication from the standpoint of effective representation of the client by his attorney.

He discusses thoroughly, and with perspicuity, the initial interview with the client, representation of the client in the course of agency investigation, the negotiation of informal settlements, and the various aspects of formal adjudication, including the obtaining of judicial review of final administrative action. In this latter area your reviewer finds himself in minor disagreement with the author.

In discussing the scope of judicial review of constitutional and jurisdictional fact issues, Mr. Cooper seems to join the perhaps prevailing "mood of pessimism" among administrative lawyers that review of such issues will, in the future, be governed by the substantial evidence rule or other restrictive rule which the courts apply to ordinary fact issues. Your reviewer has not yet succumbed to this mood and believes that the judicial trend may actually be in the other direction today, at least in the state courts.

In support of his view that findings of constitutional fact "may henceforth be treated on the same basis as ordinary findings of fact, for purposes of judicial review," Mr. Cooper cites *Alabama Public Service Commission v. Southern Ry. Co.*[1] That case involved the question whether a federal court should intervene in the state administrative process by enjoining enforcement of the order of a state commission despite the availability of adequate judicial review in the state courts. In refusing to permit the federal district court to take jurisdiction, the Supreme Court pointed out that under Alabama law "judicial review calls for an *independent judgment as to both law and facts and when a denial of due process is asserted.*" (Emphasis added.) As this decision indicates, state courts have not generally abandoned the principle that fact issues upon which constitutional rights depend should be independently reviewed by the courts. See, for example, *Texas & New Orleans Railroad Co. v. Railroad Commission.*[2]

In support of his view that review of jurisdictional facts may hereafter be similarly restricted, Mr. Cooper cites *Myers v. Bethlehem Shipbuilding Corporation*[3] and *Connecticut Light & Power Company v. Federal Power Commission.*[4] The *Myers* case stands for the proposition that administrative action may not be enjoined at the outset, upon claim of lack of jurisdiction, where the administrative process includes appropriate review procedures. The statement by Justice Brandeis that the administrative order will not be enforced if the reviewing court finds that the jurisdictional fact issue is "without adequate evidence to support it," or is "otherwise contrary to law" does not necessarily mean that such issues will be subject to the same limited review which is applied to ordinary fact issues. There was

1 341 U.S. 341 at 348 (1921).
2 155 Tex. 323, 286 S.W. (2d) 112 (1956).
3 303 U.S. 41 (1938).
4 324 U.S. 515 (1945).

no real dispute as to the *facts* upon which jurisdiction was premised in the *Connecticut Light & Power Company* case. The controversy was essentially one of law, and the Court remanded the case to the agency to reconsider the jurisdictional issue on the basis of the Court's construction of the statute. Until *Crowell v. Benson*[5] has been directly reversed, lawyers may at least contend that jurisdictional fact issues should receive a more comprehensive scope of judicial review than the courts give to non-jurisdictional fact issues.

Mr. Cooper's book should be required supplemental reading for students taking administrative law. It not only provides the student with a clear insight into administrative adjudication, but also, by contrast, helps the student to appreciate the objectives and effectiveness of procedural safeguards in judicial proceedings. For the practicing lawyer, and particularly for the lawyer whose practice only occasionally brings him before administrative agencies, the book supplies invaluable advice and caution against errors which even the most skilled trial lawyer may unwittingly commit in administrative practice.

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