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## Administrative Law--Judicial Review Under West Virginia Administrative Procedure Act Not Applicable to Agency Actions Relating Solely to Internal Management

Paul Robert Rice  
*West Virginia University College of Law*

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# West Virginia Law Review

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## CASE COMMENTS

### **Administrative Law—Judicial Review Under West Virginia Administrative Procedure Act Not Applicable to Agency Actions Relating Solely to Internal Management**

Disciplinary action was instituted against a member of the Department of Public Safety resulting in his demotion and transfer to another post within the state. There was a full hearing and all prescribed procedures were followed. When the adversely affected member appealed to the circuit court, the State Department of Public Safety petitioned the West Virginia Supreme Court of Appeals for a writ of prohibition to prohibit the circuit court from proceeding. *Held*, writ granted. The West Virginia Administrative Procedure Act<sup>1</sup> does not apply to actions taken by

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<sup>1</sup> W. VA. CODE, ch. 29A (Michie Supp. 1964). See generally Harrison, *The West Virginia Administrative Procedure Act*, 66 W. VA. L. REV. 159 (1964).

an agency which relate solely to its internal control and management. In addition, all of the administrative remedies which were available had not been exhausted. *State ex rel. Burchett v. Taylor*, 149 S.E.2d 234 (W. Va. 1966).

The principal case is of particular interest since it is the first judicial interpretation of the application of the West Virginia Administrative Procedure Act enacted in 1964. One of the principal issues is the relationship of due process of law and the reviewability of administrative decisions.

The Model State Administrative Procedure Act was promulgated by the National Conference of Commissioners of Uniform State Laws in 1944. Since its promulgation, various states, including West Virginia, have adopted acts patterned after it.<sup>2</sup> The purpose of these acts is to establish a uniform method of administrative adjudication by all agencies, to provide notice and an opportunity to be heard and present evidence before such agencies and to establish a uniform method of court review of all administrative adjudications.<sup>3</sup>

Prior to the adoption of the act a direct judicial review of an administrative decision was available only if specifically provided by statute.<sup>4</sup> In the absence of statutory review the use of common law writs such as certiorari, mandamus and prohibition was necessary for review. Occasionally, extraordinary writs such as quo warranto,<sup>5</sup> habeas corpus<sup>6</sup> or writ of procendendo<sup>7</sup> would be employed. Certiorari is the discretionary remedy which is used when no specific provision for appeal is provided. It is confined to judicial and quasi-judicial acts and also to the records which are before

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<sup>2</sup> DAVIS, ADMINISTRATIVE LAW 11 (1965).

<sup>3</sup> IND. STAT. ANN. ch. 30, § 63-3001 (1962). The West Virginia Code does not set forth the purposes for which the West Virginia Administrative Procedure Act was adopted, so a comparison is made here to the similar Administrative Procedure Act of another state which does set forth its purposes.

<sup>4</sup> *People ex rel. Chillicothe Township v. Board of Review*, 19 Ill.2d 424, 167 N.E.2d 553 (1960).

<sup>5</sup> *Petition of O'Leary*, 325 Mass. 179, 89 N.E.2d 769 (1950).

<sup>6</sup> *State ex rel. Federated Dep't Stores, Inc. v. Brown*, 165 Ohio St. 521, 138 N.E.2d 248 (1956).

<sup>7</sup> *State ex rel. Baer v. City of Beckley*, 133 W. Va. 459, 57 S.E.2d 263 (1949).

the agency.<sup>8</sup> Prohibition is used to control actions of a judicial or quasi-judicial nature when the body in so acting has usurped its power, is without jurisdiction to take such action or, having jurisdiction, exceeds its legitimate power.<sup>9</sup> Mandamus is used to require a body to act or to control actions of officers in an agency in exercising their discretion, but only in the presence of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive or misapprehension of law upon their part.<sup>10</sup>

The West Virginia Administrative Procedure Act now provides that a review is obtainable by filing a petition with either the circuit court of Kanawha County or of the county in which the petitioner resides.<sup>11</sup> However, the act expressly preserves the other means of review.<sup>12</sup> Thus it appears that West Virginia has ignored the admonition of a recognized authority on administrative law who has criticized the failure to make a petition the only form of procedure for obtaining judicial review of administrative action regardless of the reasons involved. "Mere establishment of the petition for review, without abolition of the extraordinary remedies [certiorari, prohibition and mandamus] as a means of review, will not suffice. We know that where that solution has been tried the extraordinary remedies have continued to cause unnecessary litigation."<sup>13</sup>

The right to review under the West Virginia Act is provided in the following language: "Any party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter . . . ."<sup>14</sup> However, this right is limited by the act's definitions of "contested case," "agency" and "rule."<sup>15</sup>

The Act defines a "contested case" as: "a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or con-

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<sup>8</sup> *United States Steel Corp. v. Stokes*, 138 W. Va. 506, 76 S.E.2d 474 (1953).

<sup>9</sup> *Village of Bridgeport, Ohio v. Public Serv. Comm'n*, 125 W. Va. 342, 24 S.E.2d 285 (1943).

<sup>10</sup> *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

<sup>11</sup> W. VA. CODE ch. 29A, art. 5, § 4(b) (Michie Supp. 1965).

<sup>12</sup> W. VA. CODE ch. 29A, art. 5, § 4(a) (Michie Supp. 1965).

<sup>13</sup> *Davis, Forms of Proceedings for Judicial Review of Administrative Action*, 44 ILL. L. REV. 565, 629 (1949-1950).

<sup>14</sup> W. VA. CODE ch. 29A, art. 5, § 4(a) (Michie Supp. 1965).

<sup>15</sup> W. VA. CODE ch. 29A, art. 1, § 1 (Michie Supp. 1965).

stitutional right to be determined after an agency hearing, but shall not include cases in which an agency issues a license . . . and shall not include rule making.”

From this definition it appears that a statutory provision or requirement imposed by the West Virginia Constitution, involving a right, duty, interest or privilege, as interpreted by the courts, must be involved before a judicial hearing is permitted.<sup>16</sup>

The court in the principal case noted that there were no constitutional or statutory provisions giving a member of the department of safety any tenure of office or position. Therefore, since no duty, right or interest was involved, a “contested case” was not involved and no right existed for a direct judicial review.

A Michigan case, *Sherwin v. Mackie*,<sup>17</sup> held that a dispute between realty owners and the State Highway Commission, concerning the prohibition of parking on a highway abutting their property, was not a “contested case” as defined in the Michigan statute.<sup>18</sup> “The order of the defendants here in question affected all members of the public using the trunkline in question . . . . It [the agency hearing] was not a proceeding to determine rights or privileges of a specific party or parties.”<sup>19</sup>

The definition of “agency” in the West Virginia act requires that the department involved be authorized to make rules or adjudicate contested cases. This requirement points out how the definitions of rules and contested cases are closely related to the definition of agency and, therefore, must be met before a department can be an “agency” within the contemplation of the act.

The definition of “rule” includes “every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests . . . but does not include regulations relating solely to the internal management of the agency. . . .”<sup>20</sup> Noting the specific exclusion of “regulations

<sup>16</sup> 1 COOPER, STATE ADMINISTRATIVE LAW 273 (1965).

<sup>17</sup> 364 Mich. 188, 111 N.W.2d 56 (1961).

<sup>18</sup> MICH. STAT. ANN. § 3.560(2L.1) (1961).

<sup>19</sup> *Sherwin v. Mackie*, 364 Mich. 188, 195, 111 N.W.2d 56, 60 (1961).

<sup>20</sup> Before adopting this Act, West Virginia used the same definition for “rule” in the statute which required the filing of rules by state agencies, W. VA. CODE ch. 5, art. 2, § 3 (Michie 1961).

relating solely to the internal management of the agency", it is apparent that the principal case did not involve a "rule" as defined by the act and, therefore, the disciplinary measures taken by the Department of Public Safety were not within the contemplation of the act.

Several States have adopted similar definitions for "rule" which specifically exclude regulations concerning the internal management of the agency,<sup>21</sup> but no cases have been found in these jurisdictions which have dealt with this specific exclusion. With a reasonable interpretation of the literal words of these statutes it seems that these states would be in accord with the West Virginia court's interpretation.

Judicial review, even if available by the provisions of the Act, might still be denied by the courts for various reasons. It might be denied when: (1) statutory provisions have granted exclusive discretion to the agency,<sup>22</sup> (2) statutory provisions have made all such decisions final,<sup>23</sup> or (3) the agency has been granted broad discretionary powers.<sup>24</sup> Of course, whether or not this will occur depends upon whether a question of due process arises, a constitutional or jurisdictional question or fraud is involved, the decision was clearly arbitrary or beyond the agency's jurisdiction or other reviewable irregularities appear.<sup>25</sup>

Courts frequently set up additional requirements for review, including the doctrine of exhaustion of administrative remedies. All forms of appeal which have been made available administratively must have been exercised.<sup>26</sup> The West Virginia court applies this rule and noted in the principal case that one administrative remedy had not been exhausted. The reasons for the rule are basically to utilize the experience and judgment of the agency, avoid piecemeal appeals and recognize the primacy of the agency in the field committed to it by the legislature.<sup>27</sup> However, like

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<sup>21</sup> MAINE REV. STAT. ANN. tit. 5, § 2301 (1964); MASS. ANN. LAWS ch. 30A, § 1 (1966); ILL. ANN. STAT. ch. 110, § 264 (1956).

<sup>22</sup> *Leeman v. Vocelka*, 149 Neb. 702, 32 N.W.2d 274 (1948).

<sup>23</sup> *Switchmen's Union of North America v. National Mediation Bd.*, 320 U.S. 297 (1943).

<sup>24</sup> *Gillan v. Board of Regents of Normal Schools*, 88 Wis. 7, 58 N.W. 1042 (1894).

<sup>25</sup> DAVIS, ADMINISTRATIVE LAW § 28.02 (1951).

<sup>26</sup> *Daurette v. Traders Fed. Sav. & Loan Ass'n*, 143 W. Va. 674, 104 S.E.2d 320 (1958).

<sup>27</sup> 2 COOPER, *op. cit. supra* note 16, at 572.

most rules this one too has its exceptions. The doctrine will be disregarded if the administrative remedy available is useless,<sup>28</sup> the agency does not have jurisdiction,<sup>29</sup> a question of law controls the decision,<sup>30</sup> a prevailing constitutional question is raised<sup>31</sup> or immediate and final relief is necessary to avoid irreparable harm.<sup>32</sup>

As to the constitutionality of limiting review, *i.e.*, satisfying due process requirements, the principal case demonstrates that "due process of law may be afforded administratively as well as judicially. Lawful administrative process is due process equally as much as lawful judicial process."<sup>33</sup> This has long been West Virginia's position.<sup>34</sup> A leading case on the constitutionality of restricting judicial review is *Reetz v. Michigan*.<sup>35</sup> In that case, as in the principal case, the United States Supreme Court held that due process does not require judicial review. The Court observed: "we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of regulation, the final determination of a legal question."<sup>36</sup>

Davis, in his text on administrative law, seems generally to be in favor of limiting judicial review. He feels that, unless limited somewhat, judicial review weakens and destroys the administrative process by failing to utilize the special competence which the agencies have in their respective fields. He states that "when an administrative appeal or review provides a satisfactory check, the practical need for judicial review may largely disappear . . . ."<sup>37</sup>

<sup>28</sup> *Carter v. City of Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

<sup>29</sup> *State ex rel. Gordon Memorial Hosp., Inc. v. West Virginia State Bd. of Examiners of Registered Nurses*, 136 W. Va. 88, 66 S.E.2d 1 (1951).

<sup>30</sup> *Deaney v. Linen Thread Co.*, 19 N.J. 578, 118 A.2d 28 (1955).

<sup>31</sup> *Long v. City of Highland Park*, 329 Mich. 146, 45 N.W.2d 10 (1950).

<sup>32</sup> *Hesperin Land Development Co. v. Superior Court*, 184 Cal. App.2d 865, Cal. Rptr. 815 (1960).

<sup>33</sup> *Nutler v. State Road Comm'n*, 119 W. Va. 312, 316, 193 S.E. 549, 551 (1937); see *State v. Sponaugle*, 45 W. Va. 415, 32 S.E. 283 (1898).

<sup>34</sup> *State v. Sponaugle*, *supra* note 33.

<sup>35</sup> 188 U.S. 505 (1903).

<sup>36</sup> *Id.* at 507. In conjunction with this due process question, although not raised in the principal case, is that of the right to a trial by jury. Occasionally this question is raised but it poses no problem since these administrative proceedings are special and summary proceedings created by statute subsequent to the adoption of the West Virginia Constitution. Therefore, not being in the nature of a suit at common law, a determination of facts in such proceedings can be left to the administrative agencies. *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S.E. 141 (1920).

<sup>37</sup> DAVIS, *op. cit. supra* note 24, §28.21, at 519-520.

The principal case well recognizes that judicial review of the decisions of administrative agencies is limited, not only by the definitions contained in the act, but also by policies adopted by the courts. These limitations on review do not appear to have created significant problems incident to due process of law requirements. Other issues on judicial review of administrative action under the West Virginia Administrative Procedure Act are certain to arise,<sup>38</sup> but the court's decision in the principal case will serve well to shape the pattern of judicial review in this jurisdiction.

*Paul Robert Rice*

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**Attorney and Client—Acts of Real Estate Broker Constituting  
Unauthorized Practice of Law**

*D*, a corporate real estate brokerage firm, was filling in earnest money contract forms and securing thereto signatures of buyers and sellers of real property. The *D* was also using and preparing form deeds and other instruments necessary to clear or transfer title. The forms used had been composed by lawyers. *P*, the Chicago Bar Association, sought to enjoin the alleged unauthorized practice of law. The circuit court found the forms used in the initial contracts were a necessary incident to the real estate business, but held that the use of forms in the preparation of deeds and other subsequent instruments constituted an unauthorized practice of law. The appellate court held that neither the initial contracts nor the subsequent deeds and related instruments could be filled in by *D*. *Held*, appellate court affirmed in part and reversed in part; circuit court affirmed. A real estate broker may properly fill in the usual form of earnest money contract or offer to purchase where such involves merely supplying of factual data, but the drawing or filling in of blanks on deeds, mortgages and other legal instruments subsequently executed requires the peculiar skill of an attorney and constitutes the practice of law. *Chicago Bar Ass'n v. Quinlan & Tyson, Inc.*, 214 N.E.2d 771 (Ill. 1966).

The question of what real estate services require the skill peculiar to one trained and experienced in the law had been

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<sup>38</sup> Harrison, *supra* note 1, at 190.