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Administrative Law: Final Examination (First Semester 1970-1971)

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QUESTION I:

A suit for declaratory judgment and an injunction to nullify the action of the Federal Aviation Administration in letting a contract for instrument landing systems was filed in the US District Court for the District of Columbia by Scanwell Laboratories, Inc.

The transaction involved resulted from the issuance by Federal Aviation Administration of an invitation for bids for instrument landing systems to be installed at airports to guide aircraft along a predetermined path to a landing approach. Such systems are designed to make the approach of aircraft to airports safer, a result of which the FAA sought to attain by carefully circumscribing the criteria for bids in such a way as to preclude bids from producers who did not already have an operational system installed and tested in at least one location. To this end the invitation for bids provided:

"To be responsive to this request, the contractor shall submit evidence that identical equipment complement as that proposed for this procurement has previously been installed in at least one location and has achieved at least Category I performance as certified by an FAA flight check . . . . This shall be evidenced by the submission of a certification from the flight inspection source."

When the bids for the instrument landing systems were opened, it was discovered that Scanwell Laboratories, Inc., was the second lowest bid. The lowest bid was entered by Airborne Instrument Laboratory, a division of Cutler-Hammer, Inc. Scanwell Laboratories, Inc. alleged in its suit that Cutler-Hammer's bid was not responsive to the invitation for bids in that Cutler-Hammer did not have a system installed in one location, nor did it have a certificate of performance based on an FAA flight check. Scanwell Laboratories, Inc., therefore, sought to have the action of the FAA in granting the contract to the defendant Cutler-Hammer declared null and void as a violation of statutory provisions controlling government contracts and of regulations promulgated thereunder.
The Code of Federal Regulations provided:

"To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained."

The Regulations go on to state that:

"Any bid which fails to conform to the essential requirements of the invitation for bids, such as specifications, delivery schedule or permissible alternates thereto, shall be rejected as nonresponsive."

Scanwell Laboratories, Inc. urged that it can seek review of a contract award which is in violation of the Regulations governing the issuance thereof by virtue of Section 10 of the Administrative Procedure Act.

Scanwell Laboratories, Inc. also asserted that the action of the FAA in granting this contract to an allegedly non-responsive bidder was arbitrary, capricious and a violation of the statutory provisions governing contracting, and that it can therefore be set aside under Section 10 (e) of the Administrative Procedure Act.

How should the court rule on the issue or issues presented and for what reasons?

QUESTION II:

Corn Products Company and Derby Foods, Inc. petitioned the US District Court for the District of Columbia for review on an order of the Food and Drug Administration, Department of Health, Education and Welfare, which established a definition and standard of identity for the food product known as peanut butter. They sought this review because their products, as they were formulated at the time of the order, failed to conform to the standard prescribed by FDA.

The Federal Food, Drug and Cosmetic Act (21 US C Section 341) contains the following pertinent provision:

"Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or
reasonable standards of fill of container: Provided . . .

In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label."

The challenged order was promulgated under Section 341 of the Food, Drug and Cosmetic Act. Basically, the order limited the percentage by weight of optional ingredients which might be added to the peanut ingredient to a maximum of 10%. It allowed for the addition or removal of peanut oil and limited the fat content to 55%. The standard also identified allowable additives and specified certain labeling requirements.

As originally constituted, peanut butter was composed of ground peanuts, salt, and sometimes sugar. However, this product had the disadvantages of oil separation, stickiness, short-shelf life etc. These deficiencies had been diminished, if not eliminated, by the addition of stabilizing ingredients and hydrogenated vegetable oils. Today, peanut butter consists of the peanut ingredient, which has a solid component and an oil component, the stabilizer and seasonings.

Corn Products Company and Derby Foods, Inc. are the major producers of peanut butter. Each has enjoyed a high degree of success with its peanut butter product. In 1965 Corn Products, the industry leader, claimed 22% of the market for its brand "Skippy." Derby as the second leading producer had 14% of the market from its product "Peter Pan." Their product formulations failed to qualify under the new standard prescribed by FDA in the challenged order since each used in excess of 10% of optional ingredients as these are defined by the standard, but each for a different reason.

Both petitioners were unsuccessful in urging the Food and Drug Administration to adopt a standard which would allow 13% of optional ingredients, i.e. consist of 87% peanuts. In their suits, Corn Products and Derby urged that the adoption of the 90% standard was unreasonable and arbitrary and that the standard would not promote honesty and fair dealing in the interest of consumers. Corn Products also asserted that the order would result in the taking of its property in violation of the Fifth Amendment. In addition, the petitioners contended that they were entitled to specific findings by FDA as to why their products as formulated were eliminated by the contested order.

What issue or issues are presented and what scope of judicial review should
the court afford the petitioners in this case?

QUESTION III:

Samuel Jacobowitz, plaintiff, a non-veteran career employee with more than twenty-two years of government service, filed this suit for reinstatement and back pay in the US District Court for the District of Columbia. The grounds asserted in his complaint were that his discharge from his position as a GS-9 Revenue Officer in the Internal Revenue Service was procedurally defective and that the decision removing him was arbitrary and capricious.

The material facts were these:

On May 6, 1965, a notice of proposed adverse action was issued to the plaintiff by the District Director of the Internal Revenue Service at Hackensack, New Jersey. This notice contained three charges:

Charge I. Gross Negligence in failing to promptly process checks received from taxpayers in violation of Sections 1942.52 and 142.60 of The Rules of Conduct for Internal Revenue Service Employees and failure to follow the procedures in the Internal Revenue Manual, Part 5, concerning receipt of remittances.

Charge II. False statements and falsification of records in violation of Section 1942.55 of The Rules of Conduct for Internal Revenue Employees and failure to follow the procedures in the Internal Revenue Manual, Part 5.

Charge III. Failure to make effective use of time and failure to take effective collection action in performance of official duties.

The plaintiff made an oral reply to these charges at an informal hearing on July 12, 1965, in which he denied all of them. At that time, he offered written statements of some persons involved in Charge II, showing that he had in fact made the calls on the taxpayers in question and that he had not falsified the records in this connection. He also asked for a formal hearing and requested that all of the taxpayers be produced by subpoena at the hearing and before any final decision was made.

The District Director advised the plaintiff, on August 26, 1965, without any further hearing, that all of the charges and specifications thereunder were sustained and plaintiff was dismissed from his position effective September 10, 1965. Plaintiff appealed this decision to the Regional Commissioner
of the IRS and requested a hearing.

The Regional Commissioner granted plaintiff a hearing which was held on October 13, 1965, before a Hearing Examiner. The IRS did not produce any of the taxpayers as witnesses at the hearing, nor anyone who had any personal knowledge of whether or not the plaintiff made the calls on the taxpayers as stated in his reports and which the IRS contend that he did not make. The only witnesses of the IRS at the hearing were its inspectors who had been sent out to investigate the case by talking to some of the taxpayers and others long after the calls were reported by plaintiff to have been made. All the inspectors knew was what someone else told them about plaintiff's not having made the calls.

The IRS introduced in evidence at the hearing the written statements the inspectors had obtained from some of the delinquent taxpayers on whom plaintiff said he called, and which statements stated plaintiff had not called on them as reported. These statements were introduced over the objection of the plaintiff that they were hearsay and denied him the right to cross examination. Plaintiff demanded the right to cross examine the absent taxpayers who made the statements.

During the hearing before the Hearing Examiner of the Office of the Regional Commissioner, when it became apparent the IRS was not going to produce the taxpayers as witnesses, the plaintiff again demanded that they be produced and that he be given the right to cross examine them. He requested that the hearing be adjourned until this could be done. The IRS objected to the production of the taxpayers at the hearing even though they were its witnesses and relied on their statements to sustain the charges against the plaintiff. It contended that the Examiner did not have the power to subpoena them, which was true. The IRS made no showing that the taxpayers had been asked to appear as witnesses, or that it had made any effort to have them present or that the taxpayers had refused or were unable to be present. The plaintiff, on the other hand, tried to produce the taxpayers but succeeded in producing only three of the fourteen involved.

The plaintiff appeared in person at the hearing before the IRS Examiner and testified in his own behalf. He denied each and every specification in Charges II and III and said they were not true. He testified that he made every call on the delinquent taxpayers as shown on his reports, and he introduced into evidence written statements of eight of the fourteen taxpayers involved which stated he had in fact called on them as reported. Three of the taxpayers appeared in person and testified at plaintiffs request that they
told the IRS Inspectors plaintiff had called on them. Plaintiff offered in
evidence a tape recording he had made of his conversations with the remaining
three taxpayers after the charges had been filed to show by the voices of the
taxpayers their admission that he had called on them. The Hearing Examiner
refused to admit the tape into evidence, and refused to even listen to it be-
fore he rejected it.

The plaintiff offered to testify that the charges were filed as the result
of bias and prejudice against him by his superior because he had filed two
grievance procedures against his superior previously, and had received a 90
day letter because of it. The Examiner refused this testimony.

The plaintiff admitted the facts set forth in Charge I, but said it was a
frequent occurrence in IRS for checks to get misplaced temporarily and it was
not a matter of concern to anyone. This was later confirmed by other IRS em-
ployees who testified at the hearing. The plaintiff also testified that his
group clerk should have found the checks when they were in the files. The late
cashing of these checks did not cause any loss to anyone. The plaintiff had
received a reprimand for this occurrence and had thought the matter closed until
the charge was filed.

At the conclusion of the hearing the IRS Hearing Examiner sustained Charge
I and Charge II but dismissed Charge III. This became the decision of the
Regional Commissioner of Internal Revenue.

The plaintiff appealed to the New York Regional Civil Service Commission
and a hearing was held May 2, 1966. The Commission reversed the IRS decision,
holding that plaintiff should have been allowed to introduce the tape record-
ing and should have been allowed to testify the charges were of a retaliatory
and descriminatory nature, and remanded the case to the IRS for a further
hearing.

Both parties appealed to the Board of Appeals and Review of the Civil
Service Commission. The Board decided on September 6, 1966, that the rejection
of the tape recording and retaliatory evidence was not error and remanded the
case to the New York Regional Civil Service Commission and ordered it to ad-
judicate the case on its merits. A further hearing was held by the Regional
Commission on October 1, 1966. Thereafter the Regional Commission sustained
Charge I and Charge II and denied plaintiffs appeal. Plaintiff again appealed
to the Board of Appeals and Review which denied his appeal on February 14, 1967.
He then appealed to the Civil Service Commission in Washington which denied
his appeal on June 8, 1967. This suit followed.

What issue or issues are presented in this suit by the plaintiff seeking
reinstatement and back pay? How should the court rule upon them and why?

QUESTION IV:

Easton Publishing Company of Easton, Pennsylvania filed an application with the Federal Communications Commission for a license to operate a standard broadcasting station in Easton. At or about the same time Allentown Broadcasting Corporation of Allentown, Pennsylvania also filed an application for a license to construct and operate a standard broadcasting station in Allentown.

Both stations would have to operate on the same frequency, and, despite the fact that neither station would render service to the other community, simultaneous operation of two stations would cause mutually destructive interference.

The FCC Hearing Examiner who conducted the hearings on the two applications recommended that the Allentown application be granted and the Easton application denied. Easton filed exceptions to the recommended decision of the Hearing Examiner with the Commission. After oral argument the Commission issued its final decision, rejecting the Hearing Examiners recommended decision and granting license to Easton Publishing Co. The Commission made detailed findings of fact as to the qualifications of the applicants and as to the nature of the communities to be served. Both applicants were found legally and technically, financially and otherwise qualified to become licensees; both communities were found to be in need of programs proposed to be broadcast by each applicant. Easton had only one radio broadcasting station whereas Allentown had three. The Commission recognized that Allentown was a city of almost triple the size of Easton and growing at a faster pace, but FCC found that Easton's need for two stations so it would have a choice between locally originating radio programs was the determining fact.

On judicial review of the Commission's order awarding the license to Easton, Allentown Broadcasting Co. argued that the Commission's reversal of its Hearing Examiner was erroneous on the ground that the FCC did not have authority to overrule its Examiner's findings without "a very substantial preponderance of the testimony as recorded to the contrary" and that the Examiner's findings could be overruled by FCC only when they were "clearly erroneous."

What disposition should the reviewing court make of this contention of Allentown Broadcasting Co., and for what reasons?

QUESTION V:

The National Enforcement Commission served simultaneous administrative notices on Grand Central Aircraft Co. and on Jonco Aircraft Corporation charging
each of them with violations of the Wage Stabilization provisions of the De-

defense Production Act of 1950, and scheduling hearings thereon. Grand Central

and Jonco were two small business corporations manufacturing aircraft parts.

In that posture of the administrative proceedings, the two aircraft manu-

facturers filed separate suits in the United States District Court for the

District of Columbia to enjoin further administrative action and hearings on

these charges by the Commission to determine their guilt of the violations

asserted, until after these suits had been heard and adjudicated on the merits

by the Court. In their respective suits the aircraft manufacturers alleged:

1. The conduct of the proposed administrative hearings

would cause irreparable damage by cutting off their

bank credit and depriving them of essential working

capital.

2. The Defense Production Act of 1950 did not authorize

the National Enforcement Commission to institute such

administrative proceedings for the enforcement of the

Wage Stabilization provisions.

The District Court consolidated the two cases for hearing since the issues

involved were identical.

In their respective verified complaints the two Aircraft companies alleged

that the administrative proceeding itself would cause irreparable injury by

cutting off their bank credit, thereby depriving them of essential working

capital, regardless of the outcome on judicial review of the administrative

proceeding, because: (1) If the National Enforcement Commission should find

a violation it would certify to all government agencies including the Internal

Revenue Tax Service for income tax purposes, the disallowance of all illegal

wage payments found by it to have been made, which would disqualify such wage

payments as a business expense for income tax purposes, thereby so substantially

increasing the Company's income tax liability as to render them insolvent. The

alleged amount of excess wage payments involved was $5,000,000 for one of the

companies and $7,500,000 for the other company. (2) The Banks involved would

be alerted to this possibility by the holding of the Commission hearings and

would immediately call their loans and refuse additional working capital loans

to these two Companies which would result in their insolvency and termination

of their operations.

Counsel for the National Enforcement Commission filed a motion to dismiss

these complaints, thereby admitting for purposes of the motion the truth of all

of the factual allegations contained in the complaints.

How should the Court rule upon the motions to dismiss and for what reasons?