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Administrative Law: Final Examination (1972)

William & Mary Law School

The College of William and Mary

Marshall-Wythe School of Law

Final Examination

ADMINISTRATIVE LAW

Professor Powell

(Note: Limit your answer to each question, except as to "Question 5," to not more than three single space exam book size pages.)

Question 1:

Plaintiff Taylor commenced this action in the United States District Court for the Southern District of New York under the Civil Rights and Declaratory Judgment Acts, 42 U.S.C. §§ 1983, 28 U.S.C. §§ 1343, 2201. He sought a declaratory judgment to test the constitutionality of his dismissal by the New York City Transit Authority (Authority) and an injunction to nullify his dismissal and to require his reinstatement with back pay. In his complaint he alleged that he was dismissed from employ of the New York City Transit Authority in violation of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution.

The facts in this case are not in dispute. On July 15, 1962, plaintiff, an Authority Road Car Inspector then off duty, was involved in an altercation in which he was implicated in an assault with a gun upon a stranger. He was arrested, but criminal charges were subsequently dropped. When the facts of his off duty behavior came to the attention of the Authority, a formal charge and specification was prepared by the office of the Authority's General Counsel which was responsible for the prosecution of dismissal actions. The charge was brought pursuant to the agency's rules and regulations and was served together with a notice of hearing on July 30, 1962 over the name of the then General Counsel, Daniel T. Scannell (Scannell), who had been on vacation in Europe since July 10th, not to return until August 13th.

On August 9th, a day after all criminal charges were dropped against plaintiff, a departmental hearing on the misconduct charge was held before a hearing referee, who sustained the charge and recommended discharge of plaintiff from the Authority's employ. The report containing the referee's findings and recommendation, along with a full transcript, was submitted to the Authority's Members on August 12th. On August 13th, Scannell returned from Europe, and on August 14th was

appointed a Member of the Authority, succeeding a Member who resigned the same day to accept a judicial appointment. As the record of the proceeding before the Authority showed, in the absence of the Authority's third Member, Scannell, on September 4th, cast the second, last and deciding vote against plaintiff, who was then formally notified of his dismissal.

Section 76 of the New York Civil Service Law, as effective in 1962, reads as follows:

"§ 76. Appeals from determinations in disciplinary proceedings

"1. Appeals. Any officer or employee believing himself aggrieved by a penalty or punishment of demotion in or dismissal from the service, or suspension without pay for a period exceeding ten days, or a fine of over fifty dollars, imposed pursuant to the provisions of section seventy-five of this chapter, may appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice act. If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after receiving written notice of the determination to be reviewed.

"2. Procedure on appeal. Where appeal is taken to the state or municipal commission having jurisdiction, such commission shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the commission may determine. The commission may direct that such appeal shall be heard by one or more members of the commission or by a person or persons designated by the commission to hear such appeal on its behalf, who shall report thereon with recommendations to the commission. Upon such appeal the commission shall permit the employee to be represented by counsel.

"3. Determination on appeal. The determination appealed from may be affirmed, reversed, or modified, and the state or municipal commission having jurisdiction may, in its discretion, direct the reinstatement of the appellant or permit the transfer of such appellant to a vacancy in a similar position in another division or department, or direct that his name be placed upon a preferred list pursuant to section eighty-one of this chapter. In the event that a transfer is not effected, the commission is empowered to direct the reinstatement of such officer or employee. An employee reinstated pursuant to this subdivision shall receive the salary or compensation he would have been entitled by law to have received in his position for the period of removal including any prior period of suspension without pay, less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The decision of such civil service commission shall be final and conclusive, and not subject to further review in any court.

"4. Nothing contained in sections seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special, local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. L.1958, c. 790, eff. April 1, 1959."

Plaintiff, elected to appeal to the Civil Service Commission, which held a judicial-like adversary proceeding in which the parties were represented by counsel. The Commission denied plaintiff's appeal on or about June 7, 1963. At no time was the constitutional issue of Scannell's disqualification raised in these proceedings.

On September 18, 1964, fifteen months after the Commission's denial of his appeal, plaintiff commenced a New York statutory proceeding for review, which combines elements of common law mandamus and certiorari, in the New York Supreme Court, Kings County, Special Term, where plaintiff first alleged the due process constitutional issue. The New York court dismissed the proceeding on January 13, 1965, on the ground that plaintiff was precluded from maintaining the court action. The Supreme Court Appellate Division affirmed. The judgment was unanimously affirmed without opinion by the New York Court of Appeals. Review was not sought in the United States Supreme Court. Instead, the present action was instituted in the United States District Court.

The New York City Transit Authority filed a motion for a summary judgment. What grounds should the Transit Authority assign for its motion? How should the United States District Court rule thereon and why?

Question 2:

The Atomic Energy Commission instituted an administrative proceeding for the purpose of determining whether an electric utility company whould be licensed to construct a nuclear electric power generating plant on the shore of Lake Michigan. At the commencement of the proceeding, motions to intervene as parties were filed by Thermal Ecology Must Be Preserved, an unincorporated association, Concerned Petitioning Citizens, an unincorporated association, the Michigan Steelhead and Salmon Fishermen's Association, an unincorporated association, Michigan Lake and Stream Associations, Inc., a non-profit corporation, and Sierra Club.

Over the objections of the electric utility company and of the Commissions counsel, these motions to intervene were granted by the Commission.

As the hearing proceeded, the Commission refused to permit the interveners to offer evidence of thermal pollution. Thereupon, the interveners made a motion before the Commission for a temporary stay of the hearings for the purpose of giving the interveners time to seek a court review of the Commission's ruling, denying them the right to introduce this evidence. The Commission denied this motion and proceeded with the hearing. Interveners objected.

Thereupon, the interveners filed with the United States Court of Appeals of the District of Columbia Circuit a petition for review and motion for a temporary injunction staying the hearings being conducted by the Commission, until the Court should rule upon the validity of the Commission's ruling, denying interveners the right to introduce evidence.

You are counsel for the Commission. What procedure should you follow before the Court?

What should you contend, and what should be the basis of your contentions?

How should the Court rule and why?

Question 3:

The Investment Advisers Act of 1940 reads in pertinent part as follows:

> Section 202(a)(11) of the Act, 15 U.S.C. § 80b-2(a)(11), defines "investment adviser" as:
>
> [A]ny person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities;....
>
> Section 202(a)(11)(D), 15 U.S.C. § 80b-2(a)(11)(D), provides, however, that the term "investment adviser" does not include:
>
> [T]he publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation;....
>
> Section 203(a) of the Act, 15 U.S.C. § 80b-3(a)(1964), provides:
>
> Except as provided in subsection (b) of this section, it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

The Act delegates to the Securities and Exchange Commission (SEC) the authority to regulate investment advisers and to enforce its provisions. In this connection, the Act provides:

> (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provision of this subchapter...have been...violated...it may in its discretion require...a statement in writing...as to all the facts...and may otherwise investigate all such facts....
>
> (b) For the purposes of any investigation...[the Commission] may require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material....
>
> [c] In case of...refusal to obey a subpoena...the Commission may invoke the aid of any court of the United States [within jurisdictional boundaries]...[a]nd such court may issue an order requiring such person...to produce records.

In the early part of 1969, the SEC undertook to investigate whether the Wall Street Transcript Corporation was violating the Act by acting as an investment adviser without complying with the registration provisions. The Wall Street Transcript Corporation, published the "Wall Street Transcript".

The "Wall Street Transcript" is published every Monday and is distributed through the mails and at newsstands....The Transcript confines its content to reporting that which others have said, written, or done, and to editorials, primarily with respect to business or financial matters....

The Transcript is copyrighted as a newspaper....It has a second-class postage permit from the United States Post Office Department....

The Transcript now has about 8,000 subscribers, including universities, libraries, corporations, individuals, trust companies, accounting firms, mutual funds, brokers, insurance companies and government agencies....

In connection with its investigation, the SEC served the following subpoena on Wall Street Transcript Corporation, directing the production at the scheduled Commission hearing of:

> All of the following relating to the business of Wall Street Transcript Corporation during the period from January 1, 1967 until the present:
>
> (1) Copies of all advertisements, notices, circulars, newspaper articles and any other writings used in connection with the sale of The Wall Street Transcript.
>
> (2) All correspondence with subscribers and prospective subscribers to The Wall Street Transcript.
>
> (3) All documents, agreements, memoranda, correspondence and any other writings relating or containing reference to the obtaining of reports, comments, management speeches and any other written materials for publication in The Wall Street Transcript."

The President of the Wall Street Transcript Corporation appeared at the SEC hearing, but refused to comply with the subpoena. Subsequently, the Commission brought an action in the United States District Court for the Southern District of New York, seeking judicial enforcement of the subpoena.

You are counsel for the Wall Street Transcript Corporation. On what grounds would you oppose the enforcement of the subpoena by the Court?

How should the Court rule and why?

Question 4:

The solicitation of proxies from shareholders of corporations whose securities are registered under section 12 of the 1934 Securities and Exchange Act is governed by section 14 of that Act and the rules promulgated thereunder by the SEC. Rule 14a-8 requires management to include in its proxy statement all shareholder proposals that are properly submitted and that do not come within one of the several enumerated exceptions. One enumerated exception allows management to omit a shareholder proposal from its proxy statement "[i]f it clearly appears that the proposal is submitted by the security holder primarily for the purpose of . . . promoting general economic, political, racial, religious, social or similar causes . . . ." When management claims an exception, it must notify the proposing shareholder of its intention to omit his proposal, offer its reasons for doing so, and furnish a copy of any supporting opinion of counsel. Similar documents must be filed with the SEC. If the SEC staff agrees with management's position or decides not to institute federal court action for other reasons, it will normally issue a no-action letter.

A no-action letter indicates that the SEC staff does not intend to recommend that the Commission take action against the corporation under the securities laws on the basis of the facts presented by the corporation. Although these letters do not bind the Commission, it usually does not alter the position taken by its staff.

The Commission has no power to issue orders requiring compliance with the proxy rules. Instead, it has utilized the extra-statutory, persuasive devices of the no-action letter and of the related letter of comment. Aside from these, the only meaningful way in which the SEC may enforce the proxy rules is to sue in a federal district court to enjoin

a threatened violation of the rules. To supplement SEC enforcement any shareholder aggrieved by the corporation's noncompliance with the proxy rules has a private cause of action, which he may bring in federal district court.

Petitioner, the Medical Committee for Human Rights, an unincorporated non-profit association of individuals, was a shareholder of Dow Chemical Company. It submitted a resolution concerning the Company's manufacture of napalm for inclusion in Dow's 1969 proxy materials, which read:

> RESOLVED, that the shareholders of the Dow Chemical Company request that the Board of Directors, in accordance with the by-laws of the Dow Chemical Company, consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm.

Management stated that it did not intend to include petitioner's proposal in its materials, and its counsel filed a memorandum of opinion with the SEC in support of its position. Medical Committee requested that the SEC staff review Dow's decision and that the Committee be allowed oral argument before the Commission if the staff upheld management's position. The Chief Counsel of the SEC Division of Corporation Finance notified Dow and the petitioner that, for the reasons cited by management, the Division would not recommend that the SEC take action against Dow if it excluded the shareholder proposal from its proxy materials. The letter merely stated that, "[f]or reasons stated in [management's] letter and the accompanying opinion of counsel . . . this Division will not recommend any action . . . if this proposal is omitted from the management's proxy material."

Without indicating its reasoning, the Commission, "without a hearing or oral argument" later "approved the recommendation of the Division of Corporation Finance that no objection be raised if the Company omits the proposals from its proxy statements for the forthcoming meeting of shareholders.'"

Medical Committee filed a petition for review of this SEC determination in the District of Columbia Circuit.

You are counsel for the SEC, and you are directed by the Commission to oppose Medical Committee's petition for review. How would you proceed?

What grounds would you assign?

How should the Court rule and why?

Question 5:

For the past few years the plaintiffs have supplied the federal government with the ball point pens used assiduously by civil servants from the White House to the neighborhood post office. This commodity has traditionally been procured through the system of bidding generally used to obtain supplies for the government. Use of this system is required by the provisions of law governing public contracts, unless another provision authorizes procurement without advertising.

One such other provision of law was established by Congress in 1938 through passage of the Wagner-O'Day Act (41 U.S.C. §§ 46-48 (1964), which creates a Committee on Purchases of Blind-Made Products (hereinafter "Committee"), the duties of which include selecting commodities suitable for inclusion on a Schedule of Blind-Made Products (hereinafter "schedule"); once included on this schedule, the product is no longer subject to procurement through the traditional bid system.

The statutory framework is essentially as follows: section 46 establishes the Committee, "to be composed of a private citizen conversant with the problems incident to the employment of the blind" and representatives from various government agencies. (41 U.S.C. § 46 (1964).) Section 47 provides that:

> It shall be the duty of the Committee to determine the fair market price of all * * * suitable commodities manufactured by the blind and offered for sale to the Federal Government by any non-profit-making agency for the blind organized under the laws of the United States * * *.

(41 U.S.C. § 47 (1964).) The non-profit agency for the blind which has been set up to serve as the liaison between the Committee and the blind workshops is the National Industries for the Blind (hereinafter "NIB").

Section 48 of the Act then provides that:

> All brooms and mops and other suitable commodities hereafter procured in accordance with applicable Federal specifications by or for any Federal department or agency shall be procured from such non-profit-making agencies for the blind in all cases where such articles are available within the period specified at the price determined by the committee to be the fair market price for the article or articles so procured * * *.

(41 U.S.C. § 48 (1964).

The Committee was given authority to promulgate rules and regulations designed to implement the purposes of the Act. (41 U.S.C. § 47 (1964).) The regulations issued under that authority state specifically that it is the duty of the Committee to determine which commodities are suitable for inclusion on the schedule (41 C.F.R. § 51 --1.3 (1969)) and to publish the Schedule of Blind-Made Products "listing commodities which must be procured from NIB or workshops." (41 C.F.R. § 51--1.4 (1969).) The regulations further designate NIB as the non-profit agency to assist the Committee in the equitable distribution of orders among the workshops and "delegate" to NIB "the responsibility to assist the Committee to assure that [the] regulations and the intent of the Wagner-O'Day Act are carried out." (41 C.F.R. § 51--1.5 (1969).) The respective functions of the Committee and NIB are stated by the defendant NIB to be as follows:

> It is the responsibility of the Committee to determine what commodities are suitable for sale by non-profit making agencies for the blind to the Government, to place the commodities on the Schedule and to determine the "fair market price" at which they will be sold to the Government. NIB then distributes orders received from the Government for items on the Schedule among non-profit workshops for the blind for manufacture.

On April 16, 1968, the General Services Administration (hereinafter GSA0 issued a Letter of Commitment to NIB which guaranteed purchases from it of seventy per cent of the estimated annual requirements for ball point pens and refills for the year February 1, 1969 to January 31, 1970. This "letter contract" was ratified by the Award Contract entered into on November 2, 1968.

Plaintiffs, two closely related corporations, filed suit in the district court on December 20, 1968, asserting, inter alia, that the action of the Committee in adding ball point pens and refills to the schedule was performed arbitrarily, capriciously, and in violation of law, alleging:

1. The Committee has erroneously delegated to NIB the responsibility for determining products appropriate for inclusion on the Schedule of Blind-Made Products.

2. The Committee placed ball point pens and refills on the schedule by a mail vote without any knowledge of the facts by the Committee members, but rather solely on the basis of a recommendation from NIB, thus in effect making the action of the Committee a pro forma rubber-stamping of the NIB action.

3. The effect of placing these commodities on the schedule was a disastrous dislocation of a private manufacturer and its employees in violation of the intent of Congress in passing the Wagner-O'Day Act.

4. Ball point pens and refills were not "suitable commodities manufactured by the blind" at the time they were placed on the schedule by the Committee. Rather, the action of the Committee and GSA served to set up and blind workshops in the business of producing these commodities.

5. GSA issued its Letter of Commitment prior to the time these commodities were effectively included on the schedule.

6. The commodities involved do not comply with the regulations adopted under the Wagner-O'Day Act because the value of work done by the blind is less than 15% of the total value of the commodity.

Three individual employees of the corporate plaintiffs sought to intervene in this suit to protect the interests of all employees, most of whom allegedly would be dismissed if the ball point pen contract was not secured by the corporate plaintiffs.

The corporate plaintiffs had been awarded a Certificate of Eligibility by the Department of Labor (which gives it preferential status in government contracting) due to the fact that its labor force, numbering approximately 200, "is recruited mainly from poor, disadvantaged minority groups, primarily Puerto Ricans and Afro-Americans from riot-prone environments."

Plaintiffs sought a mandatory injunction in the district court to compel withdrawal of the letter of commitment and to require the issuance for bids. The named defendants, General Services Administration and Committee on Purchases of Blind-Made Products, filed motions to dismiss, based on the following grounds:

1. Sovereign immunity.

2. Judicial nonreviewability.

3. Lack of standing to sue.

4. Suit barred as to General Services Administration, an Agency of the United States and not a suable entity under any provision of law.

How should the United States District Court rule on the motion to intervene and on the motions to dismiss, and for what reasons?