Vanderbilt Law Review

Volume 14
Issue 4 *Issue 4 - October 1961*

Article 5

10-1961

Annual Survey of Tennessee Law

Val Sanford

ANNUAL SURVEY OF TENNESSEE LAW

ADMINISTRATIVE LAW—1961 TENNESSEE SURVEY

VAL SANFORD*

I. PROCEDURAL MATTERS
A. *General*
B. *Necessity for Motion for New Trial*
C. *Scope of Review*
D. *Comparison and Analysis of Statutory Provisions*

II. SUBSTANTIVE MATTERS
A. *Motor Carrier Regulation*
B. *Beer and Whiskey*
C. *Miscellaneous Statutes*

I. PROCEDURAL MATTERS

A. General

The principal conclusion to be derived from a survey of the decisions reported and the statutes adopted during the past year in the field of administrative procedure is that sound policy necessitates the enactment of a general, uniform and effective administrative procedure act in this state.

The standards by which any procedural system should be measured can readily be stated. The basic purpose of any procedural system should be to attempt to assure that all matters within its scope are resolved on their true merits, and not on some failure to follow exactly the prescribed path. To accomplish this end, there must be reasonable certainty as to the application of the procedural rules. The rules themselves must be clearly expressed, readily ascertainable and must be susceptible of reasonable consistency in their application.

Perfection is not to be expected of any system of administrative procedure. In Tennessee, however, it is fair to say that there is no system of administrative procedure, much less an adequate and just one. Rather, there is a tangled thicket of vague, uncertain, often conflicting and inconsistent statutes and decisions into which the hapless litigant proceeds at his peril.

B. Necessity for Motion for New Trial

Illustrative of the inadequacies of the present law of administrative procedure is *City of Whitwell v. Fowler*,[1] where the supreme court

*Member, Clement, Sanford & Fisher, Nashville.

1. 343 S.W.2d 897 (Tenn. 1961).

dismissed an appeal on the ground that the appellant had not moved for a new trial after the decree of the chancery court. The case arose out of an order of the public service commission regrouping certain telephone exchanges for rate purposes. The city of Whitwell and others filed a petition for certiorari to the chancery court, which dismissed the petition. No motion for a new trial was made. The supreme court held that in proceeding under the so-called common law writ of certiorari,[2] the making of a motion for a new trial is a prerequisite to appeal. The court's decision was probably inevitable under prior decisions.[3] Motions for new trials in jury cases serve the useful purpose of clarifying and narrowing the issues on appeal. However, no useful purpose whatever is served by requiring persons seeking the review of administrative actions to go through the empty ritual of moving for a new trial.

C. Scope of Review

In two cases, *Blue Ridge Transportation Co. v. Pentecost*[4] and *Associated Transport, Inc. v. Fowler*,[5] the court had occasion to reiterate the rules regarding the scope of review of orders of the public service commission dealing with the operating rights of motor carriers. In reviewing such orders, the court is limited to the questions of whether there is material evidence to support the order, and whether the order is arbitrary, capricious, fraudulent, in excess of the commission's jurisdiction, or otherwise illegal. On questions of fact, the court cannot substitute its judgment for the judgment of the commission.

In the *Blue Ridge* case, the court considered in some detail whether the record contained material evidence to support an order of the commission granting a certificate of convenience and necessity. As in most such cases, the crucial factor was the public demand or need for the service proposed.[6] In this regard, the court found material

2. The supreme court has indicated in several opinions that insofar as the review of orders of administrative agencies is concerned, there is, strictly speaking, no common law writ. The phrase is used to denote proceedings under TENN. CODE ANN. § 27-801 (1956), as distinguished from proceedings under TENN. CODE ANN. § 27-802 (1956). *E.g.*, Hoover Motor Express Co. v. Railroad & Public Util. Comm'n, 195 Tenn. 593, 261 S.W.2d 233 (1953). In proceedings under the former section, the so-called common law writ, the review is confined to the questions of whether there is any material evidence to support the agency decision and whether the agency exceeded its jurisdiction or otherwise acted illegally, arbitrarily or fraudulently. In proceedings under the latter section, the so-called statutory writ, in lieu of appeal, the review is de novo.

3. *E.g.*, Shelton v. Mooneyhan, 205 Tenn. 425, 326 S.W.2d 825 (1959), where the same point is considered in detail.

4. 343 S.W.2d 903 (Tenn. 1961).

5. 337 S.W.2d 5 (Tenn. 1960).

6. TENN. CODE ANN. § 65-1507(a) (1956).

evidence in the testimony of a shipper that he had had a survey made and had a salesman in the area to be served; that if additional services were authorized, additional facilities would probably be opened in the area; and that it would be more efficient and economical to utilize the proposed services as compared to existing services. From the court's opinion, it is not clear to what degree the witness was specific in his testimony, or to what extent his opinions were supported by factual statements. Apparently, however, general statements, opinions and conclusions were deemed sufficient to constitute material evidence.

In the *Blue Ridge* case, the service involved was the transportation of asphalt, asphalt products and "dirty oil." The court stated that the commission should take judicial knowledge of the accelerated road program in the state, and indicated that the mere presence of this program was material evidence supporting the decision of the commission, even though the commission apparently did not base its decision on this point.[7]

The *Blue Ridge* case is indicative of the rather extreme limitations which the supreme court has imposed on the scope of review of orders of the public service commission. Apparently, any evidence tending to support the commission's order will be material and thus sufficient to support the order.

City of Whitwell v. Fowler[8] points up the difficulties encountered in attempting legislative reform in this field. By chapter 162 of the Public Acts of 1953,[9] an attempt was made to clarify the procedure before the public service commission by a comprehensive statute covering the entire field. As originally introduced, the act, among other things, provided that the court might reverse or remand any decision of the commission if the substantial rights of the petitioner were prejudiced because the findings, inferences, conclusions or decisions of the commission were "unsupported by substantial evidence in view of the entire record before the Commission."[10] This section was amended, however, to read "unsupported by the preponderance of the proof in view of the entire record before the commission."[11] In the *Whitwell* case, the court quite properly held the provision as enacted to be "entirely ineffective" as being beyond the province of the courts. The court did not, however, pass upon the effect of the invalidity of this clause upon the remainder of the section. It would appear that

7. The court apparently did not consider the statutory limitations on the commission's power to take notice of judicially cognizable facts. TENN. CODE ANN. § 65-209(d) (1956).
8. 343 S.W.2d 897 (Tenn. 1961).
9. TENN. CODE ANN. §§ 65-201 to -232 (1956).
10. H.B. 914, Gen. Assembly § 29(d) (1953).
11. TENN. CODE ANN. § 65-229(d) (1956).

the logical result would be the elision of this clause with the remainder of the section being applied in conjunction with the material evidence rule.

As pointed out above, in the *Whitwell* case the court indicated that the case was before the courts on the so-called common law writ of certiorari. The court has never expressly passed upon the effect of the procedure act for the public service commission[12] in regard to the availability of the so-called common law writ to review orders of that commission. The procedure act, unlike sections 9008-16 of the 1932 Code,[13] was obviously intended to cover the entire field of procedure before, and review of the orders of, the public service commission. Unless the judicial review sections of the act are to be held invalid by virtue of the invalidity of the sub-section discussed above, it would appear that the so-called common law writ of certiorari is not properly available to review orders of the public service commission. Nor would the so-called statutory writ be applicable. Rather, the review would be covered by the provisions of the procedure act.

D. Comparison and Analysis of Statutory Provisions

In its bienniel spawning of new agencies and new regulatory statutes, the legislature in 1961 followed its customary practice of giving to each its own pattern of procedure.

Four statutes were adopted dealing with proceedings before the commissioner of agriculture, a weights and measures act,[14] a pest control act,[15] an act regulating the sale of milk and milk products[16] and an act regulating the sale of frozen desserts.[17]

The weights and measures act is notably broad in its scope and detailed in its substantive provisions. Among the more important procedural provisions of the act are (1) provisions for the issuance of "stop-use," "stop-removal" and "removal" orders,[18] which are devices to be used by the commissioner in preventing the use of commodities in violation of the act; (2) a provision for the disposition of rejected weights and measures;[19] and (3) provisions for the review by the commissioner and by the courts of seizures and confiscations under the act. Apparently no provision was made for the judicial review of "stop-use" and similar orders, nor for any other actions of the commissioner except seizures and confiscations. The

12. TENN. CODE ANN. §§ 64-201 to -232 (1956).
13. Now found in TENN. CODE ANN. §§ 27-901 to -913 (1956).
14. TENN. CODE ANN. §§ 71-201 to -246 (Supp. 1961).
15. TENN. CODE ANN. §§ 43-609 to -614 (Supp. 1961).
16. TENN. CODE ANN. §§ 52-331 to -334 (Supp. 1961).
17. Tenn. Pub. Acts 1961 ch. 235.
18. TENN. CODE ANN. § 71-212 (Supp. 1961).
19. TENN. CODE ANN. § 71-221 (Supp. 1961).

provisions for the review of seizures and confiscations are quite general and on the whole quite vague. More emphasis is placed on making certain that unsuccessful petitioners pay for the cost of preparing the transcript than on defining the procedural rights of the parties. In this, as in several of the other statutes enacted by the 1961 and other recent legislatures, judicial review is "by a petition for common law writ of certiorari."[20] It is unfortunate that the legislature has seen fit to codify a misnomer. Another interesting feature of this act is a prohibition of any judicial action suspending the orders of the commissioner.[21] The pest control act was amended extensively, including provisions dealing with the review of license revocation proceedings.[22] The provisions for hearing before the commissioner and for judicial review are quite similar to those found in other statutes administered by the commissioner of agriculture. As in several of the other recent statutes, the provisions for appeal from the judgment of the circuit court are a possible source of difficulty in construction—any dissatisfied party "may . . . appeal to the Supreme Court and have a re-examination in that Court of the whole matter of law and fact appearing in the record." This act does contain one salutary feature: a provision dispensing with a technical bill of exceptions.

The procedural aspects of the act regulating the sale and distribution of milk and milk products,[23] and the act regulating the sale of frozen desserts[24] are practically identical. The judicial review provisions are similar to those found in the weights and measures act. As to hearings before the commissioner, the acts provide "such proceedings shall be informal and the rules of evidence shall not apply." The provisions governing hearings before the commissioner on the revocation of a license under these acts differ markedly from those governing hearings on revocation of a license under the pest control act; so too do the provisions governing the remedies available to the commissioner.

One of the most fruitful sources of litigation in the field of administrative law has been the actions of county beer boards in granting and revoking licenses. The legislature amended the provisions of the beer board statutes dealing with judicial review to provide that the review will be "by statutory writ of certiorari, with a trial de novo as a substitute for an appeal"[25]—thus making the supreme court the

20. TENN. CODE ANN. §§ 71-241 to -242 (Supp. 1961).
21. TENN. CODE ANN. §§ 71-243 to -245 (Supp. 1961).
22. TENN. CODE ANN. § 43-614 (Supp. 1961).
23. TENN. CODE ANN. §§ 52-331 to -334 (Supp. 1961).
24. Tenn. Pub. Acts 1961 ch. 235.
25. TENN. CODE ANN. §§ 57-205 to -209 (Supp. 1961).

supreme beer board for the State of Tennessee. In view of the oft repeated statement that the vesting in the courts of the power to substitute their judgment for that of an administrative agency in matters not of a judicial nature is unconstitutional, the amendment will probably be held unconstitutional; at least it will be in so far as it applies to the granting of beer licenses, since the granting of beer licenses would not appear to be a judicial function.

Two companion acts in the field of private education offer a striking contrast in their procedural provisions. An act to regulate solicitors for correspondence schools has a scant two paragraphs covering the procedure for hearings before the commissioner of education and judicial review thereof.[26] An act regulating private business schools has several sections on the same matter.[27] Once again the procedural aspects of the latter act are in a class by themselves.

In still another act regulating dealers of liquid petroleum gas, no provision whatever is made for hearings on the granting of licenses, though the enforcing officer is given discretion in that regard, and no provision is made for the judicial review of any action of the enforcing officer in granting or revoking licenses or otherwise.[28]

Persons engaged in the business of selling fire arms are now required to be licensed by the commissioner of revenue, who may revoke their licenses "upon good cause" or upon violation of the law. No provision for hearings before the commissioner is contained in this act. The action of the commissioner in revoking a permit, but apparently not in refusing to issue one, is reviewable "in accordance with the provisions of sections 27-901 through 27-914."[29]

Boiler and pressure vessel erectors and repairmen were not slighted except that the statute providing for their licensing contains no procedural provisions at all.[30]

An act authorizing and regulating dental service plans also contains its own vague and inadequate procedural provisions. For example, licenses are subject to revocation "after due notice and right of hearing."[31] Judicial review is "upon a writ of certiorari." Here the petitioner has thirty days in which to file a petition instead of the ten given under the pest control act. Perhaps the most interesting feature, however, is that the commissioner of insurance and banking, who administers the act, is given the authority to adjudicate any

26. TENN. CODE ANN. §§ 49-4001 to -4007 (Supp. 1961).
27. TENN. CODE ANN. §§ 49-3901 to -3924 (Supp. 1961).
28. TENN. CODE ANN. §§ 53-3601 to -3609 (Supp. 1961).
29. TENN. CODE ANN. § 39-4912 (Supp. 1961). An interesting problem is the extent to which the code sections referred to in this act are applicable to other acts which partially cover the same ground.
30. TENN. CODE ANN. §§ 53-2714 to -2722 (Supp. 1961).
31. TENN. CODE ANN. § 56-3523 (Supp. 1961).

dispute or controversy between a dental service plan corporation, any participating dentist, or any subscriber.[32]

In none of the acts was any provision made for rule-making procedures, or for challenging the validity or testing the applicability of rules. Considering the extent of the rule-making powers delegated by the legislature both in 1961 and in previous years, it is shocking that so little attention is paid to the procedure for their adoption, promulgation and application.

II. Substantive Matters

A. Motor Carrier Regulation

Two cases involving the construction of sections of the State Motor Carrier Act show an interpretive skill on the part of counsel worthy of a theologian of ancient Alexandria, and further demonstrate the pressing need for a thorough revision of the act.[33] In *Associated Transport, Inc. v. Fowler*,[34] the court was confronted with the proper construction of the statute governing the transfer of certificates of convenience and necessity, which provides in pertinent part that "if the Commission shall be of the opinion that the purchaser thereof is in all respects qualified under the provisions of this chapter, to conduct the business of a motor carrier within the meaning thereof" then the commission shall transfer the certificate.[35] Over the years, the commission has construed this sub-section to mean that the issue in transfer proceedings was whether the transferee was qualified to conduct the operation, that is, had sufficient equipment, financial resources, etc., and that the question of the need for the service was not proper in such proceedings. Nevertheless, the commission has granted many certificates which the carriers have allowed to become dormant or "sick." The transfer of such certificates, especially where they could be joined with other authority to provide new service, has created a serious question of policy. In the instant case, the certificates involved apparently were dormant or "sick." The commission, in an effort to meet the question of policy, chose to read into the phrase "in all respects qualified" not only the qualifications of the carrier, but also the need for the service, and held that the carrier in

32. Tenn. Code Ann. § 56-3529 (Supp. 1961).

33. The basic statute, sections 65-1501 to -1525, was adopted in 1933. Tenn. Pub. Acts 1933 ch. 119. It is substantially the same as the former act, Tenn. Code §§ 5471-501 (1932), which in turn was based on Tenn. Pub. Acts 1929 ch. 58. The Tennessee statute antedates the Federal Motor Carrier Act and the acts of most of the states. In the years since its adoption, there have been vast changes in the industry and corresponding changes in the needs and interests to be regulated.

34. 337 S.W.2d 5 (Tenn. 1960).

35. Tenn. Code Ann. § 65-1507(d) (1956).

this instance had not demonstrated its qualifications to provide this service. The supreme court sustained the position of the commission.[36]

Tennessee-Carolina Transportation, Inc. v. Pentecost[37] arose out of an attempt by a motor carrier to utilize the provisions of the late and unlamented Joe Davis Act[38] to join its certificates so as to be able to provide through service between Nashville and Chattanooga. Having been permanently enjoined from providing the service under its original certificate, the carrier sought to meet the requirements of the statute by abandoning a part of one of its certificates. The statute governing such matters[39] provides that no motor carrier shall abandon or discontinue any service established under the act without an order of the commission, and further that the commission may for proper cause revoke, alter or amend any certificate of convenience and necessity. In this case, the commission, on application of the carrier, had authorized the abandonment of part of a certificate. The court held that this could not be done, that while the commission could authorize the abandonment of all service under the certificate, it could not authorize the abandonment of the certificate itself. Certificates thus appear to have viability independent of the service which they authorize.

The legislature amended the Motor Carrier Act to define with more particularity the exemption therefrom of certain transporters of petroleum products,[40] and to authorize the public service commission to appoint "enforcement officers" having broad powers to arrest for any violations of the act or of orders, decisions, rules or regulations of the commission.[41]

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36. The result in the particular case may well reflect sound policy, but it would appear that the proper way for the commission to have achieved it would have been through the adoption of a comprehensive rule under section 65-1507(c), which gives the commission the power to provide rules governing certificates of convenience and necessity. All of which points up the general and unfortunate tendency of state administrative agencies to neglect their rule-making powers.

37. 334 S.W.2d 950 (Tenn. 1960). The contrast in the court's approach to these two cases is of interest. Both cases turned on questions of statutory construction. In the *Associated Transport* case, the court utilized the canon of not reversing the commission unless its action was arbitrary, and of not substituting its judgment for that of the commission in sustaining the construction adopted by the commission. In the *Tennessee-Carolina* case the court, in striking down the commission's order, used the canon that the commission is a creature of statute and has no power not granted by statute.

38. Tenn. Code Ann. § 65-1508 (1956) repealed by Tenn. Pub. Acts 1959 ch. 248, so called in honor of the carrier for whose benefit it was reputed to have been enacted.

39. TENN. CODE ANN. § 65-1514 (1956).

40. TENN. CODE ANN. § 65-1503 (Supp. 1961).

41. TENN. CODE ANN. §§ 65-1506 to -1518 (Supp. 1961).

B. Beer and Whiskey

Historically alcoholic beverages have provided a source of great revenue for governments and the legal profession. There is no indication of any diminution of the supply for either. In *Little v. MacFarland*[42] the court affirmed the revocation of the licenses of certain retail whiskey dealers on the ground that they had engaged in business as wholesalers, even though the statute authorizing revocation of such licenses did not specifically make such conduct grounds for revocation.

In *Sparks v. Beer Committee*[43] the beer committee had, in 1951, granted a permit to sell beer. In 1958 a church was established within two thousand feet of the place of business of the beer dealer. In 1959 a petition was filed with the committee to revoke the permit of the dealer on the ground that his place of business was within two thousand feet of a church contrary to the provisions of the controlling statute. The committee revoked the license, but the court held its action to be arbitrary and unreasonable.

In *Crowley v. De Kalb County Beer Board*,[44] the court held that a county beer board had properly denied a permit to sell beer where neither the petition for the permit nor the evidence had disclosed where the petitioner proposed to sell beer.

C. Miscellaneous Statutes

The space required precludes a review of the substantive aspects of the many statutes dealing with regulatory agencies adopted by the legislature in the 1961 session. Some of the more significant statutes have been discussed in connection with procedural matters.

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42. 337 S.W.2d 233 (Tenn. 1960).
43. 339 S.W.2d 23 (Tenn. 1960).
44. 334 S.W.2d 949 (Tenn. 1960).