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Administrative Law -- 1955 Tennessee Survey

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ADMINISTRATIVE LAW—1955 TENNESSEE SURVEY

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Judicial review of administrative agency action, with emphasis upon the limited nature of such review, has again been of major importance in Tennessee Administrative Law during the survey period. This is shown to be true not only in the number of decisions but also in the frequent utilization (and apparent broadening) of the doctrine of *Hoover Motor Express Co. v. Railroad & Public Utilities Commission*[1] in according finality to administrative action. In addition to holdings on various aspects of judicial review, the Tennessee appellate courts contributed important decisions during the survey period dealing with delegation of legislative power and the application of the doctrine of res judicata to administrative action.

Delegation of Legislative Power

By definition, an administrative agency is an organ of government, other than a regular court or legislature, which can adjudicate the rights of private parties or affect such rights by making rules having the force and effect of law.[2] Possession of the quasi-judicial or quasi-legislative function, or both, thus distinguishes the administrative agency from the purely executive. Nevertheless, when rule-making power is conferred by the legislature it is generally assumed that it must avoid an unconstitutional delegation of legislative power to the agency. There is no uniformity of approach but probably the usual rule recognizes that vesting a subordinate law-making function in the agency is permissible if the legislature has declared basic policy and furnished sufficiently precise standards.[3]

The decision of the Tennessee Supreme Court in *Department of Public Welfare v. National Help "U" Association*[4] may be taken to rely in part on this principle but to place much greater emphasis on the conclusion that the power delegated was "ministerial" or "administrative" in character rather than "purely legislative." The case arose on demurrer to a bill filed under Chapter 228 of the Public Acts of Tennessee for 1953[5] which authorized the State Department of Public

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1. 195 Tenn. 593, 261 S.W.2d 233 (1953); see discussions in Sanders, *Administrative Law—1954 Tennessee Survey*, 7 VAND. L. REV. 733, 741-45 (1954); Hunt, *Constitutional Law—1954 Tennessee Survey*, 7 VAND. L. REV. 763, 781-85 (1954); Lacey, *Judicial Review of Administrative Action in Tennessee—Scope of Review*, 23 TENN. L. REV. 349-69 (1954).
2. DAVIS, ADMINISTRATIVE LAW 1-4 (1951).
3. MERRILL, ADMINISTRATIVE LAW 48-58 (1954); *but compare* DAVIS, ADMINISTRATIVE LAW c. 2, pp. 86-88 (1951).
4. 270 S.W.2d 337 (Tenn. 1954).
5. TENN. CODE ANN. §§ 4765.138-52 (Williams Supp. 1954).

Welfare to license and regulate child welfare agencies. Section 4 of the Act reads in part as follows:

> "Section 4. *Be it further enacted,* That all child welfare agencies, as defined in Section 1 of this Act shall be licensed annually by the department, said license to be based on standards developed in accordance with the following six points of excellence:
>
> "(1) The present need for the proposed child welfare agency.
>
> "(2) The good character and intention of the applicant.
>
> "(3) The adequate financing of the organization.
>
> "(4) The capability, training and experience of the workers employed.
>
> "(5) The facilities for and the methods of care provided, and the consideration of the best interest of the child and the welfare of society in any placements of children to be made.
>
> "(6) The probability of permanence of the child welfare agency.
>
> ". . . .
>
> "The department shall develop and publish standards for license for each child welfare agency defined in Section 1 of this Act."[6]

In an opinion by Justice Burnett the Supreme Court affirmed the decree of the chancellor overruling the demurrer of the National Help "U" Association to the bill for injunction filed by the Department of Public Welfare.

The Court reasoned that the power conferred on the department by the above-quoted section was not purely "legislative" but mere administrative discretion as an adjunct to law enforcement. "Of course the Legislature cannot delegate the exercise of its discretion as to what the law shall be, but it certainly in modern times may confer a discretion in the administration of the law."[7] Referring to the "points of excellence" in the statute, the opinion declares: "Such standards are definite and clear, though they leave the details of the requisites for the issuance of license to the discretion of the department. These details clearly are ministerial matters and may properly be delegated."[8] In conclusion the opinion points out that protection is afforded in the Act against arbitrary action by the department through provisions for hearing before the agency and review by the circuit court of the county where the child-caring or adoptive agency is located.

The choice of words embodied in Section 4 of the statute virtually invites an attack upon the delegation of power to the agency for lack of standards prescribed by the legislature. As the appellant's brief in the above case declares, the general rule is usually thought to be that the legislature itself must prescribe the standards or norms.[9] For example, a recent New York decision involved a statute requir-

6. *Id.* § 4765.141.
7. 270 S.W.2d 337, 339 (Tenn. 1954).
8. *Ibid.*
9. *Id.* at 338.

ing private schools to be "registered under regulations prescribed by the board of regents." The statute was invalidated, by a divided court, on the ground of the insufficiency of the statutory standard.[10] Certain differences between the New York case and the Tennessee decision under discussion with respect to guides or controls over administrative rule-making power are readily apparent. The "six points of excellence" in Section 4, as well as the definitions in Section 1 of the 1953 Tennessee Act, would undoubtedly be regarded as providing clearly apparent legislative standards in most jurisdictions.[11] Of course the "standards" referred to in the statute which the department is to develop and the "standards" required to avoid an unconstitutional delegation of legislative power embody entirely different concepts. The draftsman of the 1953 Act used a novel term instead of the applicable legally-defined term in delegating rule-making power to the agency and then complicated the problem, in this respect at least, by using a legally defined term in a context where it would be vulnerable to an attack on a constitutional basis. The court very properly did not permit this technical defect in drafting to render the statute invalid on demurrer. This decision, of course, does not negate the possibility of rules being issued which would be invalid because ultra vires, that is, not reasonably within the scope of the power granted as modified by the "points of excellence" set forth in the statute.[12]

The opinion in the instant case does not stress the presence of adequate standards in the legislation under attack. Major attention is given instead to the conclusions that the power granted is not exclusively legislative in character. Individual sentences in the opinion taken in isolation would seem to suggest a virtual unlimited authority in the legislature to grant rule-making power to an administrative agency where the purpose of regulation or other law enforcement is made clear.[13] It is believed that the opinion has no such scope. Rather the decision would seem to indicate that the Tennessee court is concerned primarily with whether or not the legislature has abdicated the basic law-making function in the particular instance. The opinion recognizes that rather broad powers to implement a legislative policy may be turned over to an administrative agency and that whether these are legislative or not (in an invalidating sense) depends upon the subject matter of the particular legislative pronouncement and the reasonable relation of the power to the declared legislative purpose. The court's designation of the power

10. Packer Collegiate Institute v. University of State of New York, 298 N.Y. 184, 81 N.E.2d 80 (1948), 49 COL. L. REV. 573 (1949).
11. MERRILL, ADMINISTRATIVE LAW 49-53 (1954).
12. See Addison v. Holly Hill Fruit Producers, Inc., 322 U.S. 607 (1944); Hunt, *Constitutional Law*, 7 VAND. L. REV. 733, 734 (1954).
13. 270 S.W.2d 337, 339, 340 (Tenn. 1954).

granted by Section 4 of the Act to the Department of Public Welfare as "administrative" might seem more of a conclusion than an explanation. Still it is of practical value in recognizing that in law and fact we have developed a branch of government that does not fall within any one of the traditional three branches. Furthermore, the problem of administrative rule-making is placed in its proper prospective. If the legislature has performed the basic law-making function and within reasonable limits left it to an agency to fill in the details this latter function is not "legislative" in any constitutional sense. What the reviewing court must do is to determine whether the proper balance between the legislative and administrative has been maintained. This is probably as helpful and useful an approach as the search for the "sufficiently precise standard."

Judicial Review

Method: "Common Law" certiorari has been the standard method of securing judicial review of administrative agency action in Tennessee.[14] As the name suggests, specific legislation has not been required even though it exists.[15] Further the common-law writ has been thought to be constitutional in its basis.[16] It has, however, been named specifically as the vehicle for securing such review in many of the regulatory statutes including those relating to the sale of beer. By this method Code Section 1191.14 and 1191.47 would appear to permit virtually any inquiry by the reviewing court as to the legal authority of an agency to take action. In 1953 the Supreme Court said in *Crowe v. Carter County*[17] that certiorari to the circuit courts as provided in the foregoing section was the exclusive method of review of the action of beer boards and that the revoking of a permit was not subject to an injunction on the ground that the board had not been legally elected.

However, in *Evers v. Hollman*,[18] decided in 1954, the Supreme Court reversed a circuit court decision which, on certiorari, had vacated a beer board's revocation of a permit on the ground of improper selection of the members of the board. In the *Evers* case before any proceedings were had before the beer board, the permit holder had moved the dismissal of certain charges against her on the ground that the board had not been created as provided in the statute. The particular defect alleged was that the board was appointed by the

14. See Anderson v. Memphis, 167 Tenn. 648, 72 S.W.2d 1059 (1934); Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n, 195 Tenn. 593, 261 S.W.2d 233 (1953); see Lacey, *supra* note 1.

15. TENN. CODE ANN. § 8989 (Williams 1934). *Cf.* the statutory writ in lieu of appeal. *Id.* § 8990.

16. TENN. CONST. Art. VI, § 10.

17. 263 S.W.2d 509 (Tenn. 1953); see Sanders, *Administrative Law—1954 Tennessee Survey*, 7 VAND. L. REV. 733, 740 (1954).

18. 268 S.W.2d 97 (Tenn. 1954) (opinion by Tomlinson, J.).

county judge instead of elected by the county court. This motion was overruled by the board and after hearing the permit was ordered revoked. The circuit court, upon hearing under the common-law writ of certiorari, held that the board was not properly elected and vacated its order of revocation. The Supreme Court's reversal of this action declared that the members of the alleged defective board "were not less than officers de facto." *Crowe v. Carter County* was cited as standing for the proposition that the action of a beer board could not be attacked on the ground that the board had not been legally elected. Yet the procedure followed in the *Evers* case for review was precisely that which the *Crowe* case said should have been utilized to question an identical defect.

The results of the *Crowe* and *Evers* decisions taken together may be restated as a rule of substantive law that beer permit holders have no legal rights with respect to the method of selection of the beer board. Apparently such persons would not have standing to challenge board action for this reason by any type of proceedings where the rule as to de facto officers was applicable. The rule seems on first impression to be an unduly restrictive limitation upon judicial review of administrative agency action, since it can be demonstrated that a question of legal authority to act is involved and the question is presented by one adversely affected by action of the agency. Still the result is probably not inconsistent with the general law on the subject of officers de jure and de facto.[19] The decision illustrates the important point that the body of law relating to officers de facto is not displaced or superseded by our statutory or other provisions for judicial review of administrative agency action, even though such review provisions may be stated very broadly in scope.

Black v. Nashville[20] might also be mentioned under method of judicial review. The Supreme Court here affirmed the chancery court's sustaining of the city and beer board's plea in abatement to a suit for an injunction. By her bill Mrs. Black the complainant, sought to enjoin the city and the beer board from appealing from a decision of the circuit court which had restored a license revoked by the beer board. The evidence before the beer board in the revocation proceedings had been that the husband of the permit holder had been convicted of selling whiskey. Subsequent to the beer board hearing, the circuit court had heard an appeal from the conviction and had found that the husband had not sold the whiskey. The theory of Mrs. Black's bill was that the determination of the whiskey-selling charge by the circuit court subsequent to the taking of evidence on the revocation by the board was final on that point; the chancery court should, therefore, enjoin any attempt of the beer board to appeal from the order of the circuit court

19. See the same case in the article on Local Government, *infra*.
20. 276 S.W.2d 718 (Tenn. 1955).

which had set aside the action of the beer board in revoking Mrs. Black's permit. The Supreme Court declared that the matter was to be determined entirely by the record made before the beer board[21] and not by the evidence or the result in the circuit court on the whiskey-selling charge. "The attack made . . . in this suit was in effect a collateral attack on the judgment of another court and it is well settled . . . that this cannot be done, and that the proper method for the correction of errors of a particular court is by appeal."[22]

Timing: Questions of timing of proceedings for judicial review of administrative action usually involve such preliminary conditions as "ripeness" for review and exhaustion of administrative remedies.[23] *Arendale v. Rasch*[24] is concerned with timeliness in the sense of seeking court review within the period set by statute (in this instance a private act). Petition for certiorari was filed in the circuit court at Memphis more than thirty days subsequent to action of the Shelby County Board of Adjustment permitting variation in use in a zoning case. Section 11, Chapter 613, Tennessee Private Acts of 1931, provides for a thirty-day period subsequent to final action by the board within which a petition for certiorari and supersedeas could be filed. The rules of procedure of the Shelby County Board of Adjustment provide that a petition to rehear must be filed not later than the next meeting after the complained-of decision. In the *Arendale* case the petition to rehear was filed late; the thirty-day period for seeking court review through petition for certiorari began to run from the date of original adverse action. The Supreme Court in an opinion by Justice Prewitt affirmed the granting of a motion to dismiss the petition, expressly resting its decision on the failure to file within the time limit set in the private act.

Scope of Review: Under this aspect of judicial review the problem is the extent to which the reviewing court will substitute its judgment for that of the administrative agency with respect to questions of fact and of law involved in a particular proceeding. Tennessee has normally followed the "substantial evidence" rule on review of factual determinations by the agency, *i.e.*, the findings of fact by the agency, if supported by substantial evidence in the record before the agency, will not be overturned.[25]

The Supreme Court had occasion to reiterate this principle in the opinion on the petition to rehear in *Evers v. Hollman*.[26] The language suggests support for an even greater "hands-off" approach on the part

21. TENN. CODE ANN. § 1191-14 (Williams Supp. 1952).
22. 276 S.W.2d 718, 719 (Tenn. 1955).
23. See DAVIS, ADMINISTRATIVE LAW c. 15 (1951).
24. 268 S.W.2d 102 (Tenn. 1954).
25. Tennessee Cartage Co. v. Pharr, 184 Tenn. 414, 199 S.W.2d 119 (1947); see Sanders, *supra* note 17, at 741.
26. 268 S.W.2d 97 (Tenn. 1954).

of reviewing courts (the scintilla rule), although it is believed that no such broader inference should be drawn.

> "In such proceeding [certiorari to review a beer board's revocation of permit] the Circuit Court is without authority to weigh the evidence. It may review the evidence solely for the purpose, and to the extent, of determining whether any of it that is material supports the action of the Beer Board. If the record contains such supporting evidence the Circuit Court may not disturb the Beer Board's action. . . .
>
> ". . . for this Court to have remanded this case in order that the Circuit Court might weigh the evidence, as the petition to rehear insists, will amount to nothing less than a remand of the case for a consideration . . . of a question which the Circuit Court has no jurisdiction to consider."[27]

The above language may be contrasted with that of the Court of Appeals for the Middle Section in *Porter v. Tennessee Real Estate Commission*.[28] Here the court affirmed the action of the circuit court which had upheld the action of the real estate commission in revoking appellant's license as a broker. Judge Howell's opinion makes no mention of the function of the reviewing court with respect to the evidence before the agency. It speaks of the support in the record for "the finding of the trial judge" and concludes "that there is no error in the action of the trial judge in suspending his license for one year."[29]

In *Black v. Nashville*[30] the most important problem related to the record upon which the validity of the action of the administrative agency would be reviewed. Apparently (although this is not entirely clear) the circuit court overruled the beer board on the basis of facts relating to the husband's conviction that were known or determined by it independently of the record before the board. The Supreme Court's opinion makes it clear that such a procedure, if it occurred, would have been in error.[31] It might be observed that, normally, the best solution for one seeking the benefit of factual changes subsequent to the administrative hearing would be to request the agency to reopen, or to request the reviewing court to remand to the agency for the reopening of the record, for the reception of evidence relating to the changed facts. The granting of such request would depend, of course, on the legal relevance of the alleged change in circumstances under the regulatory scheme administered by the particular board.

These cases make it clear that the substantial evidence rule (or "material evidence" as many of the decisions express it) and the rules precluding the reviewing court from determining facts independently of the record made before the agency and from weighing the evidence

27. *Id.* at 101.
28. 271 S.W.2d 21, 23 (Tenn. App. M.S. 1954).
29. *Id.* at 23.
30. 276 S.W.2d 718 (Tenn. 1955).
31. *Id.* at 719.

before the agency are all parts of a single basic principle of judicial review when a nonjudicial type determination has been made. The 1953 decision of the Supreme Court in *Hoover Motor Express Co. v. Railroad & Public Utilities Commission*[32] is the outstanding recent example of the application of this basic principle because it demonstrates the lengths to which the Court will go in avoiding a legislative attempt to give reviewing courts a function contrary to the principle. The important nub of the decision seems to be that reviewing courts cannot constitutionally be given the job of independently determining facts or of weighing the evidence before the agency when a "legislative" or "administrative" type determination is being reviewed.[33] It is unfortunate that the strained interpretation the Court felt obliged to place on the statute relating to judicial review in the *Hoover* case to avoid the foregoing constitutional objection tends to obscure rather than elucidate the basic and generally accepted principle being utilized in the decision.

During the current survey period there were important applications of the *Hoover* precedent. In *Louisville & Nashville R.R. v. Fowler*[34] the Supreme Court reversed the chancery court because it had improperly reviewed and set aside the action of the Railroad and Public Utilities Commission in a case involving a petition to discontinue certain passenger trains. The pertinent code provision states:

> "Upon application by the carrier, the commission shall authorize the discontinuance of any passenger train when it shall be made to appear that for a period of twelve months or more, the direct operating costs of such train have exceeded the aggregate gross revenues therefrom by more than thirty per cent."[35]

The commission, in its order denying the petition of the railroad, defined the term "direct operating expense" as being "the necessary cost of the train in making its operating trip to and from its respective termini . . . the costs which were certain and inescapable as the result of the operation of a particular train." Applying this definition the commission held that engine-house expenses, maintenance of ways and structures, and expenses of joint terminal facilities did not constitute direct operating costs. The Chancery Court of Davidson County on certiorari adopted the commission's definition but held that its action in excluding maintenance of way and joint facility expenses from direct operating costs was arbitrary and illegal.

The Supreme Court in reversing the chancellor relied heavily upon the doctrine of the *Hoover* case and the assumption that, under it, the

32. 195 Tenn. 593, 261 S.W.2d 233 (1953).
33. See Sanders, *Administrative Law—1954 Tennessee Survey*, 7 VAND. L. REV. 733, 741-45 (1954).
34. 271 S.W.2d 188, 190 (Tenn. 1954).
35. TENN. CODE ANN. § 5398.1 (Williams Supp. 1952).

lower court undertook to exercise an administrative (as opposed to a judicial) function in putting an opposite evaluation upon the evidence before the commission. Further, the Supreme Court held that in making its evaluation, the commission could rely upon factors within its knowledge even though contrary to the only personal testimony appearing in the record:

> "The Railroad & Public Utilities Commission is not a Court, but is a tribunal exercising such commingled legislative, executive and judicial functions that it cannot be made a Court. The determination of whether or not the Railroad Company shall be granted an order permitting it to discontinue these trains, is an administrative function of Government. In making such administrative determination, it is necessary that the Commission hear evidence, but it is not restricted by the technical common law and statutory rules of evidence. Thus it is that, although the witness Davis was not contradicted, the Commission had the right to accept and rely on practices established by the railroads generally, or by the particular administrative determination of the subject railroad involved in this case, or it had a right to accept one and reject the other. The Commission having done the latter, that is, accepted one and rejected the other, cannot be said to be without material evidence to support its findings, and therefore, its action cannot be said to be arbitrary and void or illegal."[36]

The Court concludes that Chapter 162 of the Public Acts of 1953 would be unconstitutional if construed to permit the chancellor to put his own evaluation on the evidence with respect to what does and does not constitute direct operating costs.

In the writer's opinion the foregoing application of the *Hoover* precedent represents a significant extension rather than a precise application of the doctrine announced in the earlier case. The determination being made in the *Fowler* case here is not the same in kind as that relating to the grant of operating rights in the *Hoover* case. The Court's opinion in *Fowler* by Justice Swepston says that the question of whether a railroad shall be permitted to discontinue a train calls for administrative (*i.e.* non-judicial) determination. That is undoubtedly true in a general sense, but the precise issue here was the interpretation and application of the words of a statute to undisputed raw or evidentiary facts. Without getting into all the ramifications of questions of law and of fact[37] it will be recognized that a question as to how under the law to characterize certain facts (the meaning of the statute as applied to these facts) is frequently treated as question of law, or mixed question of law and fact—in either event a determination not at all foreign to the judicial function.[38]

It is believed that the result in this case is to change the character

36. Louisville & N.R.R. v. Fowler, 271 S.W.2d 189, 192 (Tenn. 1954).
37. See Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944); DAVIS, ADMINISTRATIVE LAW § 245 (1951).
38. DAVIS, ADMINISTRATIVE LAW 874-78 (1951).

of the *Hoover* doctrine of judicial noninterference by extending it into the area of statutory interpretation and questions of law. Nevertheless it should be noted that there is much support throughout the country for doing under similar circumstances substantially what the Tennessee Supreme Court did here. *Gray v. Powell*,[39] the 1941 decision of the Supreme Court of the United States, is treated as the leading case on the doctrine that is used here although not invoked. In that case the Court upheld a finding by the administrator of the Bituminous Coal Act that the Seaboard Airline Railway was not a "producer" of coal it consumed for purposes of exemption provided in the statute. "In a matter left specifically by Congress to the determination of an administrative body . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing . . . and an application of the statute in a just and reasoned manner."[40] The Court went on to observe that lack of dispute as to the evidentiary facts "does not permit a court to substitute its judgment for that of the [administrator]. . . . Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted . . . to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."[41]

A more recent authoritative statement of the principle of *Gray v. Powell* is found in *Unemployment Compensation Commission of Alaska v. Aragon*.[42] The *Aragon* case is cited and quoted approvingly (and with emphasis) by the Supreme Court of Tennessee in *Moore v. Commissioner of Employment Security*.[43] In the Tennessee case a claim for unemployment compensation had been denied by the Board of Review and the other internal machinery of the Department of Employment Security because the claimant was not "available for work," an eligibility condition prescribed in the statute. It appeared that the claimant had quit his work on the swing shift and was seeking day work only because he considered shift work injurious to his health (although he offered no medical or other evidence to this effect). On petition for certiorari, the chancellor reversed the Board of Review on the ground that there was no evidence in the record to sustain its finding. The Supreme Court reversed the chancellor and quoted from a previous Tennessee decision using broadly significant language from the *Aragon* case:

> "The question presented 'is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must

39. 314 U.S. 402 (1941); see DAVIS, ADMINISTRATIVE LAW § 246 (1951) (particularly pp. 882-87).
40. Gray v. Powell, 314 U.S. 402, 411 (1941).
41. *Id.* at 412-13.
42. 329 U.S. 143 (1946).
43. 273 S.W.2d 703 (Tenn. 1954).

> determine it initially.' To sustain the commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The *'reviewing court's function is limited'*. All that is needed to support the commission's interpretation in that it has 'warrant in the record' and a 'reasonable basis in law.' *Unemployment Compensation Commission of Territory of Alaska v. Aragon*, 329 U.S. 143, 67 S. Ct. 245, 250, 91 L. Ed. 136, 145."[44] (Emphasis added by Tennessee Supreme Court.)

It will be noted that in the *Moore* case, as in the *Fowler* case, the problem is that of the scope of judicial review when an agency construes and applies the words of a statute to undisputed evidentiary facts. The very broad leeway given to the administrative agency in the opinions should be tempered in application by the fact that there is evidence in each case of a rather considerable review of the merits by the Supreme Court and there is nothing to indicate that it disagreed in fact or in law with what the agency had done. The more crucial case for the use of the principle here announced would be a case where the court disagreed with the agency and still refused to interfere. In actual operation, there is always in the background the reviewing court's undoubted power to set aside arbitrary, unreasonable and unwarranted findings whether factual, legal or mixed in their nature.

It is obvious that there is no mechanical solution to the problems of scope of review. Decisions are and should be made not only on the basis of an analysis of the technical nature of the question at issue but on such practical considerations as the relative adequacy of the particular agency in terms of competence, thoroughness and procedural fairness.[45] Basically, too, there is the matter of who can best determine workable policies on the particular point[46]—whose judgment does the statutory framework and the nature of our political institutions place in a presumptively preferred status so that it should be overturned only under compelling circumstances.

Judicial review of the development of an administrative agency program can undoubtedly err by failing to take responsibility for policy judgments where within the court's province as well as by too much intrusion into functions best performed by the agency. The specialized nature of the agency may prevent adequate consideration of public policy factors other than those in its statute. *Gulf, Mobile & Ohio R.R. v. Railroad & Public Utilities Commission*[47] is a possible example of too much judicial relinquishment of responsibility. The case, arising on certiorari to review the commission's order suspending the railroad's reduced petroleum tariff rates, resulted in an affirmance

44. Milne Chair Co. v. Hake, 190 Tenn. 395, 403, 230 S.W.2d 393, 396 (1950).
45. Compare DAVIS, ADMINISTRATIVE LAW §§ 248, 250, 251 (1951).
46. See *id.* § 248.
47. 271 S.W.2d 23 (Tenn. App. M.S. 1954).

of the chancellor's dismissal of the carrier's petition. The decision relies heavily on the *Hoover* decision and *Tennessee Central Ry. v. Pharr* [48] in refusing to interfere with the commission's discretion after noting that the statute provides that it shall exercise a careful and watchful supervision over tariffs and increase or decrease them as justice to the public and the carriers may require.[49] In this case, however, the railroad was seeking to compete for petroleum business it had lost to motor carriers during World War II as a result of a defense transportation order prohibiting short hauls. The commission refused to permit the railroads to reduce their tariff, an identical rate being set for rail and motor carriers. The court's opinion seems to treat the whole subject as one that the court can do nothing about once it determines that a general power to supervise and increase tariffs exists in the commission. There is virtually nothing in the reviewing court's opinion which seeks to examine the conformity of the administrative action to the statutory guides regarding justice to the public and the carriers and the findings that were made in that respect. The consuming public was being deprived of the probable benefit of cheaper petroleum products by this agency action. The facts would suggest a more thorough-going check of the agency action. Competition, which is usually treated as of central importance in American business enterprise, was being prohibited here. Perhaps the railroad's reduced rates which the commission ordered it to raise were both competitive and remunerative to it. Perhaps efficiencies and cost-saving factors available to the railroads would justify the lower rate as compared with the motor carrier rate.[50] If so, justice to the consuming public and to the rail carrier might well require that the lower rate be permitted. On the other hand, of course, the rail carrier might have been setting the lower rate at a loss for the purpose of eliminating motor carrier competition. In this latter case the justification for the commission's action of disapproval would be apparent. We are not told which of these two situations existed here.

From the standpoint of judicial review, the point is that there would seem to be an obligation to require the agency (the commission) to face up to and make findings sufficient to show reasonable compliance with the guides given in the statute and with pertinent policies, judicially cognizable and applicable, embodied elsewhere in the laws of the state. The opinion in this case at least gives no indication of what the facts were surrounding the agency's order, or what findings were made with regard to application of the several guides for agency action set forth in Section 5425 of the Tennessee Code. The concept that

48. 29 Tenn. App. 531, 198 S.W.2d 289 (M.S. 1946).
49. TENN. CODE ANN. § 5425 (Williams 1934).
50. Compare ICC, CLASS AND COMMODITIES RATES, NEW YORK TO PHILADELPHIA, 51 M.C.C. 289 (1950).

rate-setting is essentially nonjudicial in character and the consideration that in such matters the courts normally should not interfere cannot obscure the equally important fact that questions concerning agency interpretation and application of a statute arise with respect to which the reviewing court could properly exercise some judgment of its own.

Res Judicata

"Courts normally apply law to past facts which remain static—where res judicata operates at its best—but agencies often work with fluid facts and shifting policies."[51] This reasoning has led some courts to assert that the doctrine is inapplicable to decisions of administrative tribunals.[52] The overwhelming weight of authority, however, is opposed to any such complete rejection.[53] During the survey period the Tennessee Supreme Court relied upon the doctrine as the basis for its decision in *Polsky v. Atkins*.[54]

In this case the Supreme Court affirmed the judgment of the circuit court which on certiorari had overturned the order of the Commissioner of Finance and Taxation denying a renewal of a liquor license. The record before the commissioner showed that Polsky had held a retail liquor license for some six years in Chattanooga. Under the statute[55] a license application is to be made annually and the applicant must furnish a certificate of good moral character from designated city officials. In 1952 Polsky had been refused such a certificate but the city failed, after notice, to appear at a hearing on the matter before the Commissioner of Finance and Taxation at which Polsky and an assistant attorney general for the state did appear. At this 1952 hearing Polsky testified as to the circumstances believed to be involved in the refusal of the certificate. The commissioner issued a license for 1953 to Polsky after the hearing. On the occasion of Polsky's application for a 1954 license he was again refused a certificate by city officials. On the hearing before the commissioner on this occasion, however, the officials appeared and evidence was introduced relating to sales to minors by Polsky in November, 1952.

The commissioner denied the application but, on review, the circuit court found this denial arbitrary because there was no evidence upon which it could be based. The Supreme Court affirmed in an opinion by Justice Burnett, stressing the fact that "fair play" and the provision for review in the liquor licensing statutes "demand" the application of

51. DAVIS, ADMINISTRATIVE LAW 563 (1951).
52. Churchill Tabernacle v. FCC, 160 F.2d 244, 246 (D.C. Cir. 1947); *but cf.* Cardinal Bus Lines v. Consolidated Coach Corp., 254 Ky. 586, 72 S.W.2d 7 (1934).
53. DAVIS, ADMINISTRATIVE LAW 565-71 (1951).
54. 270 S.W.2d 497 (Tenn. 1954).
55. TENN. CODE ANN. §§ 6648.10-14 (Williams Supp. 1952).

the doctrine of res judicata under such circumstances.

A leading authority has said that to some administrative action the principle of res judicata should be applied in all its rigor, while to other such action it is wholly inappropriate.[56] Appropriateness then is the key to the use of the idea and this factor requires consideration of convenience and fairness for all concerned in the particular situation. The Supreme Court's decision in the *Polsky* case seems to take essentially this approach.

56. DAVIS, ADMINISTRATIVE LAW 565 (1951).