Administrative Agencies' Appellate Review of Fact Finding
Public Utilities Com. ✓
Appellate Review of Fact Finding

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Honorable Samuel W. Collins, Jr.
Maine Senate
State House
Augusta, Maine

Dear Senator Collins:

You have asked my opinion as to whether 35 M.R.S.A. §305 is constitutionally required. This section directs the Law Court, in reviewing an action of the Public Utilities Commission, to "exercise its own independent judgment as to both law and facts" where a confiscation of property or other violation of constitutional right is alleged. I would advise that the clear trend of the decisions of the Supreme Courts both of the United States and of Maine is that independent fact finding by courts reviewing the decisions of administrative agencies is not constitutionally required.

The most obvious answer to the question of whether Section 305 is "constitutionally required," as suggested by its proponents, is that it is difficult to see how any statute could be so required. The Constitutions of the United States and of Maine place certain limits on what kinds of legislation a legislature may enact, but they do not compel the enactment of any statute. The responsibility for interpreting these Constitutions is, of course, entrusted by them to the courts. The courts may find that a certain procedure in reviewing administrative action is constitutionally required, but it is certainly not the obligation of the Legislature to do so. Thus, in the case of Section 305, if independent fact finding were constitutionally required in certain instances, the Law Court would say so and proceed accordingly. There is no need of a statute to require it to make such a determination.

As to whether the Court would so determine, however, it seems clear that it would not. As you indicated in your letter, the constitutional doctrine which Section 305 enacts into statutory law originated with the old case of Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287 (1920). As the principles of judicial review of administrative action acquired greater sophistication, the Supreme Court has retreated from this activist position, observing in Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341, 348 (1951) that ". ..[I]t is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." The history of this retreat is well documented in the principal authorities on the subject. See Davis, Administrative Law, § 29.09 (1958); Jaffe, Judicial Control of Administrative Action, 636-652 (1965); Cooper, State Administrative Law, (1965). Perhaps the best statement as to the present status of the Ben Avon doctrine is provided by Professor Davis, writing in 1958:

> "The significant fact about the Ben Avon doctrine is not that a handful of state courts follow the doctrine because the Supreme Court has failed to overrule it explicitly. The significant fact is that despite the lack of explicit overruling, the Supreme Court since 1936 has frequently refused to reassert the doctrine, even though numerous cases are finally disposed of in the lower federal courts in violation of the doctrine and even though at least eighteen state courts have specifically acknowledged some degree of violation of the doctrine."
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> Davis, Administrative Law, §29.09 at 180.

The Maine Supreme Judicial Court has been even stronger in its assessment of the vitality of the doctrine. In Frank v. Assessors of Skowhegan, 329 A.2d 167 (1974), the Court noted that the Ben Avon case,

> ". . .holding that independent judicial judgment as to both law and fact in certain circumstances is constitutionally required, although never overruled, has been so modified by [citations omitted] that its holdings can no longer be considered the law." Id. at 170 n.5.

You indicated in your letter that supporters of the doctrine cite Lewiston, Green and Monmouth Telephone Company et al. v. New England Telephone Company, 299 A.2d 895 (Me., 1973) as an indication of the Law Court's support of it. Presumably, the argument relates to footnote 8 of that opinion which discusses an earlier opinion of the Law Court, Stoddard v. Public Utilities Commission, 137 Me. 320 (1941). The footnote, however, does not hold that the Ben Avon doctrine is applicable in Maine: it merely observes that the doctrine might have been invoked to provide an alternative basis of jurisdiction in the Stoddard case, apart from that provided by the present Section 303 of Title 35.

It is interesting to note, moreover, that the Court made this observation about a case which was decided before the enactment of Section 305, (Stoddard was decided in 1941; Section 305 was passed in 1953. Laws of Maine of 1953, ch. 377, §3 (1953)). Thus, further substantiating the point that even if the Ben Avon doctrine retains some vitality, there is no need of a statute to implement it. In any event, whatever the observations of the Law Court in the Lewiston, Green and Monmouth case are taken to mean, they predate the Frank case and thus should be disregarded in view of the latter case's unequivocal statement that the Ben Avon doctrine "can no longer be considered law."

I hope this information is helpful.

Very truly yours,

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