NOTES

Administrative Law—Certiorari—Evidence Considered and Weight Given to the Findings of an Administrative Board by the Supreme Court

When a writ of certiorari is taken to the Supreme Court to review the action of an administrative board, it is difficult to determine just what the court considers in deciding the case. In many cases there is a detailed recital of the evidence.[1] In other cases the evidence is merely referred to.[2] Mere reference to the evidence does not mean that the court did not consider it fully, and inspection of the cases fails to reveal what evidence the courts consider and the extent to which they inquire into the facts. It is impossible to determine accurately whether the courts actually weigh the evidence and come to a completely independent finding, handing down a decision in accordance with their findings, substituting their judgment for that of the board; or whether they merely examine the record of the board and sustain it if it is not clearly erroneous; or, if, on the other hand, the court follows an intermediate standard. Hence, in trying to determine how much of the evidence will be considered by the court and the weight to be given the findings of the administrative board on certiorari, we can only look to the language of the court with little assurance that that language represents what was actually done in the case. In fact, there is a tendency becoming more pronounced for the court to recite the evidence

1. Colonial Life Insurance Co. v. Board of Tax Appeals, 126 N.J.L. 126, 18 A. 2d 625 (S. Ct. 1941); Plainfield v. Board of Tax Appeals, 19 N.J.Misc. 313, 19 A. 2d 195 (S. Ct. 1941); Gannon v. Board of Tax Appeals, 123 N.J.L. 450, 9 A. 2d 531 (S. Ct. 1939); Pierce v. Jersey Central Power & Light Co., 127 N.J.L. 71, 21 A. 2d 311 (S. Ct. 1941); Gilbert v. Gilbert Machine Works, 122 N.J.L. 533, 6 A. 2d 213 (S. Ct. 1939).

2. Calicchio v. Jersey City Stock Yards, 125 N.J.L. 112, 14 A. 2d 465 (S. Ct. 1940); Franklin Stores v. Burnett, 120 N.J.L. 596, 1 A. 2d 25 (S. Ct. 1938); Penna. R.R. v. Board of Public Utilities Commissioners, 13 N.J.Misc. 766, 180 A. 551 (S. Ct. 1935); West Shore R.R. v. Board of Public Utility Commissioners, 11 N.J.Misc. 149, 164 A. 688, *aff'd*, 112 N.J.L. 83, 169 A. 829 (S. Ct. 1933).

in the opinion in great detail[3] which would seem to indicate that actually the court was deciding the matter anew rather than reviewing the action of the board.

The courts until recently seem to have applied different standards for the various agencies. They have consistently treated the findings made by the lower agencies in civil service cases with much more respect than any other agency. They have applied the test that if there were any rational basis in fact for the findings of the agency, they would not upset them.[4] But even this long line of decisions was made questionable by the statement of the Court of Errors and Appeals that the Supreme Court was to settle disputed questions of fact in these cases.[5] However, the Supreme Court, after the case was sent back to them, applied the rational basis in fact test.[6]

A slightly less liberal view was taken of cases that were appealed from the Board of Public Utilities Commissioners. These findings the court said they would not disturb if there were a reasonable basis in fact for the decision[7] or substantial evidence supporting it.[8] This would seem to render the scope of review in these cases a little broader than that in the civil service cases. But this doctrine seems to have been overruled in a recent case where the language of Justice Porter, speaking for the Supreme Court, to the effect that, "a careful examination of the testimony satisfies us that the board was justified in its conclu-

3. *Supra,* note 1.

4. Riley v. Mayor of Jersey City, 64 N.J.L. 508, 45 A. 778 (S. Ct. 1900); Herbert v. Atlantic City, 87 N.J.L. 98, 93 A. 80 (S. Ct. 1915); Dodd v. Camden, 56 N.J.L. 258, 28 A. 311 (S. Ct. 1894); Kerr v. Atlantic City, 108 N.J.L. 219, 157 A. 559 (S. Ct. 1931). But see Harman v. Reed, 10 N.J.Misc. 992, 162 A. 113 (S. Ct. 1932), in which the action below was upset because the Supreme Court did not believe the credibility of the witnesses was such that their testimony would not support the finding of the board.

5. Harman v. Reed, 108 N.J.L. 191, 155 A. 145 (E. & A. 1931).

6. Harman v. Reed, *supra,* note 4.

7. West Shore R.R. v. Board of Public Utility Commissioners, *supra,* note 2; Penna. R.R. v. Board of Public Utility Commissioners, *supra,* note 2; Rahway Valley R.R. v. Board of Public Utility Commissioners, 127 N.J.L. 164, 21 A. 2d 302 (S. Ct. 1941).

8. Erie R.R. v. Board of Public Utility Commissioners, 85 N.J.L. 420, 89 A. 1001 (S. Ct. 1914).

sions. No useful purpose is to be served in reviewing the testimony. Suffice it to say that in our opinion there was ample testimony to support its finding as a reasonable conclusion and, therefore, this court cannot substitute its judgment for that of the board,"[9] was held by the Court of Errors and Appeals[10] not to indicate that the Supreme Court had found the facts independently and come to an independent conclusion. It is submitted that this holding requires that there be something more than a mere reasonable basis in fact upon which the judgment of the lower tribunal is to rest and that, in effect, a trial *de novo* must be had to satisfy this requirement. In a later case,[11] however, the Supreme Court laid down a standard that seems workable. The court said, speaking through Justice Heher: "The inquiry is whether the action taken is purely arbitrary, whether or not it has a reasonable basis to rest upon, whether or not it is supported to any extent by the facts submitted to the board for its consideration, and after it shall be made to appear to the court that such action is purely arbitrary or that it has no reasonable basis upon which to rest or is unsupported by the facts laid before the board, the court may declare it null and void and order it to be set aside." But it is doubtful that this would satisfy the requirements laid down by the Court of Errors and Appeals.[12]

The standard applied to cases on appeal from the Board of Tax Appeals provides for even a broader scope of review. The courts say that they will find the facts independently but will not reverse unless the evidence is persuasive that the Board erred.[13] This again leads to

9. New Jersey Suburban Water Co. v. Board of Public Utility Comm., 122 N.J.L. 54, 55, 4 A. 2d 47 (S. Ct. 1939).

10. New Jersey Suburban Water Co. v. Board of Public Utility Comm., 123 N.J.L. 303, 8 A. 2d 350 (E. & A. 1939), *reversing* 122 N.J.L. 54, 4 A. 2d 47 (S. Ct. 1939).

11. Rahway Valley R.R. v. Board of Public Utility Commissioners, 127 N.J.L. 164, 21 A. 2d 302 (S. Ct. 1941).

12. *Supra,* note 10.

13. Tennant v. Board of Tax Appeals, 122 N.J.L. 174, 4 A. 2d 395 (S. Ct. 1939), *aff'd,* 123 N.J.L. 200, 8 A. 2d 325 (E. & A. 1939); Borough of Haworth v. State Board of Tax Appeals, 127 N.J.L. 67, 21 A. 2d 309 (S. Ct. 1941); Zoller v. Board of Tax Appeals, 124 N.J.L. 377, 11 A. 2d 833 (S. Ct. 1940); Gannon v. Board of Tax Appeals, *supra,* note 1; Plainfield v. Board of Tax Appeals, *supra,* note 1; Hasbrouck Heights v. Board

a trial *de novo* by the Supreme Court and would seem to do little more than allow for a presumption that the Board was correct in its decision. Even this may be doubted, for in one case[14] which set forth this doctrine, the Board's finding on one point was upset on what appears to the writer to have been almost a finding of preponderance of the evidence in favor of the petitioner because he had one more expert to bolster his testimony than did the respondent. It is believed tthat the extreme in this matter of reviewing the action of lower tribunals on certiorari is to be found in the cases in which the action of the Workmen's Compensation Bureau is considered. Here the courts say that they will make an independent finding of fact and decide the case according to the preponderance of the probabilities.[15] This test, it is submitted, is a frank statement that a new trial will be had before the court.

These distinctions would seem to be almost erased by the recent decisions of the court. It has been stated that the same test will be applied in cases on appeal from the Board of Dentristry, the Board of Tax Appeals and the Workmen's Compensation Bureau.[16] In this case the opinion was written by Justice Perskie and applied the rule that the court would make an independent finding of fact and examine the evidence as in the workmen's compensation cases. Substantially the same test was applied to an appeal from the Board of Public Utilities Commissioners by the Court of Errors and Appeals[17] speaking through Justice Perskie. It is to be noted, however, that the Supreme Court, speaking through the same Justice, has said that in civil service cases the finding will not be disturbed if it has a rational basis in fact[18] in a case subsequent to that in which the Court of Errors and Appeals

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of Tax Appeals, 125 N.J.L. 617, 18 A. 2d 24 (S. Ct. 1941).

14. Lawrence v. Board of Tax Appeals, 124 N.J.L. 465, 2 A. 2d 244 (S. Ct. 1940).

15. Pierce v. Jersey Central Power & Light Co., *supra*, note 1; Kuropata v. National Sugar Co., 126 N.J.L. 44, 17 A. 2d 228 (S. Ct. 1941); McCadden v. West End B. & L., 126 N.J.L. 1, 17 A. 2d 65 (S. Ct. 1941), Stetser v. American Stores, 124 N.J.L. 228, 11 A. 2d 51 (E. & A. 1940).

16. Schwartz v. Board of Dentristry, 125 N.J.L. 330, 15 A. 2d 322 (S. Ct. 1940).

17. *Supra,* note 10.

18. Robbins v. Bloomfield, 13 N.J.Misc. 353, 178 A. 212 (S. Ct. 1935).

stated that the Supreme Court should in such cases make an independent finding of fact.[19] Hence, it appears that whatever distinctions there may have been in the scope of review from the various agencies have been rendered hazy, to say the least, by these decisions.

An administrative officer who hears many cases in his specialized field would seem to become an expert in his line and eminently able to pass upon matters which come before him. The courts have referred to expertness of boards upon rare occasions[20] but in the great majority of cases the courts treat the findings of such an expert with much less deference than they treat similar findings of fact by a jury or by a judge sitting without a jury.[21] It is to be noted also that the courts treat with greatest respect the findings in the civil service cases which are made by bodies having the power to dismiss the officer. These bodies have occasion to hold hearings on such matters very infrequently and it is to be doubted that even if such hearings were more frequent whether expertness in such matters would be attained. It almost seems that the greater the expertness of the boards, the less respect their findings will be given by the court.[22]

The Certiorari Act[23] provides that the court should make an independent finding of fact when cases are brought up by this writ. This would seem to be the source of the confusion and difficulty, for this act seems to govern all proceedings on certiorari, and the acts establishing the boards do not expressly provide that the provision of the act should not apply. The common law writ of certiorari as known

19. *Supra,* note 5.

20. Colonial Life Insurance Co. v. Board of Tax Appeals, *supra,* note 1; Gilbert v. Gilbert Machine Works, *supra,* note 1.

21. Pierce v. Jersey Central Power & Light Co., *supra,* note 1; Gannon v. Board of Tax Appeals, *supra,* note 1; Lawrence v. Board of Tax Appeals, *supra,* note 14; and other cases cited in note 1.

22. Compare the scope of review in workmen's compensation cases where involved questions of medical fact are determined by examiners who hear such cases daily with the treatment accorded the findings in the civil service cases in which the question most frequently is the guilt or innocence of an officer of a charge of neglect of duty determined by the body or person who, incidental to his other powers, has the power to dismiss the officer.

23. R. S. 2:81-8; N.J.S.A. 2:81-8.

to the court of the King's Bench whose jurisdiction was "inherited" by our Supreme Court was intended to review only the regularity and legality of the record of the lower tribunal and not to settle disputed questions of fact.[24] The legislature could not reduce the jurisdiction of the Supreme Court on certiorari below this point, but it would seem perfectly competent for the legislature to limit the power of the court to the extent of the jurisdiction under the common law writ.[25] A great deal of the confusion on this question could and should be eliminated by proper legislative action which would expressly take the questions raised by appeal from these agencies on certiorari out of the provisions of the Certiorari Act.

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24. Wilson v. Hudson, 32 N.J.L. 365 (S. Ct. 1867); 1 Tidd. Pr. 399.
25. Public Service v. Board of Public Utility Commissioners, 86 N.J.L. 105, 91 A. 313 (S. Ct. 1914).