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## HOUSEHOLD FINANCE CASE: STATUTORY REVIEW OF DISCRETIONARY POWER TO LICENSE

ROGER I. LEWIS

The recent case of *Household Finance Co. v. State*<sup>1</sup> involves judicial review of a discretionary power to issue small loan licenses; but the language used by the court is of such breadth that the entire field of judicial review of administrative licensing must be re-examined. The plaintiff (Household Finance Co.) desired to open small loan agencies in Seattle and Vancouver. In compliance with statute, it made application to the Supervisor of Banks for the necessary licenses, but the application was denied. In accordance with statutory procedure,<sup>1a</sup> the superior court of Thurston County held a trial *de novo*. At the conclusion of the hearing, the court decided that the only question on which a decision could be rendered was whether the Supervisor had been arbitrary and capricious in rejecting the application and sustained his denial of the license. In affirming the trial court, the Supreme Court held that the regulation of small loan agencies is a legislative exercise of the police power. The statute confers discretionary power on the Supervisor and it is within the limits of that discretionary power for him to refuse licenses when he finds that the local demand for service is insufficient. Therefore, review *de novo* of this function would be an unconstitutional exercise of legislative power by the judiciary. When the denial of a license is not arbitrary and capricious, the decision of the Supervisor must stand.

The *Household Finance* case is the second decision involving the Washington Uniform Small Loan Act.<sup>2</sup> The issues dealt with by the court concern § 4<sup>3</sup> which specifies the requirements which the licensee must meet and § 23<sup>4</sup> which provides for appeal if the application is denied. It is believed that the language used by the court in treating these two sections of the act was broader than necessary to deal with the points in issue, that the discretionary powers of the Supervisor under § 4 have been enlarged and made almost immune from intended judicial review under § 23; and that if the language of the case is

<sup>1</sup> 40 Wn. 2d 451, 244 P. 2d 260 (1952).

<sup>1a</sup> RCW Chap. 31.08 [REM. SUPP. 1941 §§ 8371-1 to 8371-27].

<sup>2</sup> The act was adopted in 1941 and upheld as constitutional in *Kelleher v. Minshull*, 11 Wn. 2d 380, 119 P. 2d 302 (1941).

<sup>3</sup> RCW 31.08.050 [REM. SUPP. 1941 § 8371-4].

<sup>4</sup> RCW 31.08.260 [REM. SUPP. 1941 § 8371-5].

adhered to in the future, much of Washington administrative procedure will be altered.

Section 4 provides that the applicant shall pay certain fees, and have certain assets, and that his application shall be investigated by the Supervisor of Banks to decide whether granting the license will promote the public "convenience and advantage." The plaintiff met all the requirements which § 4 lays down in positive terms; but it did not receive a license because the Supervisor, in the exercise of his discretion, found that there was insufficient demand for small loan service to justify the issuance of new licenses for Seattle and Vancouver.

The question of whether such administrative discretion is legislative or judicial in nature becomes important where the statute (as in this case) provides for an appeal. Quasi-legislative power gives the administrator in the capacity of a lawmaker authority to add to a statute; and courts generally hold that judicial review of such action is in violation of the separation of powers concept.<sup>5</sup> Quasi-judicial discretion, on the other hand, is interpretative rather than creative and the courts are willing to apply statutory appeal provisions.<sup>6</sup>

Whether the Supervisor's power was to be legislative or judicial is not clearly disclosed by the words "convenience and advantage." If "convenience and advantage" was meant to delegate the power to add clarity and detail to the statute when the need arose, then it would be beyond the power of the court to set aside such additions unless they were arbitrary and capricious. On the other hand, if the legislature meant to establish a permanent standard or rule and yet was unable to express more clearly the details of this standard, then "convenience and advantage" would be a statutory command binding the Supervisor under the interpretation of the court.

Since the court declined to make its own findings as to whether granting the licenses would have benefited the public "convenience and advantage," the Supervisor's discretion is quasi-legislative; but if this is so, it is subject to rebuttal by way of the normal rules of statutory construction. In interpreting statutes, the statute is to be considered as a whole and no individual clause should be given any special weight which would put it out of context with the rest of the act.<sup>7</sup> Since "con-

<sup>5</sup> Federal Radio Commission v. General Electric Co., 281 U.S. 464 (1930).

<sup>6</sup> Securities & Exchange Commission v. Chenery Co., 318 U.S. 80 (1943) which holds that quasi-legislative authority of a tribunal cannot be reviewed, but quasi-judicial determinations are subject to review and reversal for any mistake of law.

<sup>7</sup> Bradley Engineering and Mfg. Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170 (1910).

venience and advantage" is not clearly defined in the statute, there is nothing in the words themselves which dictates that they should vest one type of discretion rather than the other. With the interpretive possibilities evenly matched, the rule is that the interpretation given a section shall be that which makes it most clearly compatible with the rest of the act.<sup>8</sup> The remainder of the act in this case includes § 23 which gives an aggrieved applicant the right to a trial *de novo*. Since it would require a finding that "convenience and advantage" creates a set standard in order to make administrative findings thereunder reviewable and since the legislature has made the law, it would seem that § 23 dictates that § 4 creates a quasi-judicial discretion. However, the holding of the case was to the contrary.

Since the words "convenience and advantage" are part of the statute, the court was bound to make a determination of some kind; and in disposing of this problem, the court chose to adopt the Supervisor's interpretation. His determination of "convenience and advantage," then, became the law.

The Supervisor was greatly concerned with the significance of numerical limitation of small loan licenses. In referring to the findings of the Supervisor, the court expressed the view that controlling competition was an essential part of what constitutes "convenience and advantage"; and the concurring opinion of Judge Finley emphasized controlled competition as a mode of police regulation. No doubt there is merit in this concept, for it appears in the history of small lending that unrestricted competition did not, in and of itself, produce the lowest rates and best conditions via supply and demand.<sup>9</sup> Perhaps some numerical limitation would be one good attack on the problem; but there is no express authorization of numerical limitation in the statute. Despite this fact, the court makes no mention of other factors which might be considered. If numerical limitation is the sole touchstone and it is beyond the power of the court to examine the factors which the Supervisor considers, then the Supervisor has the discretion to establish and maintain a mathematical *status quo*. Indeed this case would support that interpretation because there were two applications in issue: one for Seattle and one for Vancouver; and it appears that there were differences of business conditions with respect to supply and demand. The court makes reference to the differences in general business conditions which the appellant had urged by saying that the

<sup>8</sup> Rothweiler v. Winton Motor Car Co., 92 Wash. 215, 158 Pac. 737 (1916).

<sup>9</sup> See Shattuck, *Regulation of Small Loan Companies*, 16 WASH. L. R. 117 (1941).

Supervisor's decision could be justified in both cases. The affirmance of the Supervisor is categorical and therefore there is a strong inference that controlled competition was the sole factor considered.

It is open to question whether any one person should be vested with the power to impose an absolute numerical limitation unless the business involved was truly dangerous to the community. It is likewise open to question whether the interpretation given supports the objectives of the legislature. If the legislature felt the need of numerical limitation as a controlling standard, the statute should say so. However, it does not; and in *Kelleher v. Minshull*,<sup>9a</sup> the court held that numerical limitation was not the sole desideratum intended by the legislature. If numerical limitation was not the sole factor to be considered, then the Supervisor's interpretation makes a *de facto* change in the statute. A change in a statute by an administrative officer is legislation and is in violation of the same doctrine of separation of powers which the court so vigorously sought to protect in refusing to review the Supervisor's action.<sup>10</sup>

Judge Hamley's dissent, in the instant case, was predicated on the belief that controlled competition was not the determining factor. He contends rather that § 4 was intended to eliminate undesirables in the first instance and to make sure that those who are licensed are reputable establishments. The dissent contends that there is effective control vested in the Supervisor by way of the elaborate system of accountings and reports which are required of the licensed lender by §§ 3, 7, 8, 9, 10, 11 and 17.<sup>11</sup>

The statute did provide protection against sharp practices in positive terms.<sup>12</sup> Furthermore, the act was designed primarily to protect the borrower; and it is submitted that if the administrative officer enforces these provisions, it is difficult to see how the public at large is to suffer if any particular agency is faced with able competition. On the other hand, it takes no large amount of conjecture to appreciate the moral suasion which a monopolistic agency has over the borrower who needs cash money immediately and has neither time nor means to seek out a lender in another city.

<sup>9a</sup> 11 Wn. 2d 380, 119 P. 2d 302 (1941).

<sup>10</sup> *Uhden Inc. v. Grennough*, 181 Wash. 412, 43 P. 2d 983 (1935).

<sup>11</sup> § 3, RCW 31.08.030 [REM. SUPP. 1941 § 8371-3]; § 7, RCW 31.08.080 [REM. SUPP. 1941 § 8371-7]; § 8, RCW 31.08.090 [REM. SUPP. 1941 § 8371-8]; § 9, RCW 31.08.100, 110, 120 [REM. SUPP. 1941 § 8371-9]; § 10, RCW 31.08.130 [REM. SUPP. 1941 § 8371-10]; § 11, RCW 31.08.140 [REM. SUPP. 1941 § 8371-11]; § 17, RCW 31.08.200 [REM. SUPP. 1941 § 8371-17].

<sup>12</sup> § 13, RCW 31.08.160 [REM. SUPP. 1941 § 8371-13], for example, prohibits the practice of "loan splitting."

As to the trial *de novo* provision in § 23, the court states that the legislature can control small loan businesses because their rates are usurious and hence their very existence must be justified on the basis of legislative enactment for the public need. On this basis, the court held the *de novo* provision unconstitutional because trial *de novo*, as it is used in the act, means a new trial of the law and facts to determine whether the applicant shall have a license.<sup>13</sup> Furthermore, a court cannot issue the license because this is an administrative duty and the court will not take executive power upon itself.

There may be sound basis for the court's contention that it cannot justifiably issue a license in its own right, but is there anything inherent in the nature of the determination which makes its review unconstitutional simply because it involves administrative action? In past cases, the court has held that it must review questions of law,<sup>14</sup> and in order to review questions of law a complete review of the facts may be necessary. Instances of *de novo* review of administrative action occur where constitutional guarantees are in issue. Courts review rate making cases to determine whether a rate is confiscatory even though the court could not establish the rate itself.<sup>15</sup> Likewise, a court can review the facts of a case involving a certificate of convenience and necessity to determine the issue of equal protection of the laws even though it could not issue the certificate.<sup>16</sup> Furthermore, *de novo* review may be had where the administrative functions in question are merely ministerial such as those performed by county boards of health and municipal business licensors. The court will review the facts *de novo* in deciding whether injunction or mandamus<sup>17</sup> will lie to compel the tribunal to perform a ministerial duty which the court would not perform itself. Thus in many cases, courts not only can but must conduct a trial *de novo* though the action to be taken in the case could not be taken by the court itself.<sup>18</sup>

It would appear, therefore, that the categorical refusal of the court to review facts which involve administrative determinations applies only when there are no constitutional or ministerial questions involved,

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<sup>13</sup> The following statement of the trial court was adopted, ". . . trial *de novo* means a new and independent trial on the law and facts to determine whether a license shall be granted. . . ."

<sup>14</sup> *In re Employees of Buffelen Lumber & Mfg. Co.*, 32 Wn. 2d 205, 201 P. 2d 194 (1948).

<sup>15</sup> *State v. Department of Public Service*, 19 Wn. 2d 200, 142 P. 2d 498 (1943).

<sup>16</sup> *Miller v. Tarry*, 191 S.W. 2d 501 (Tex. Civ. App. 1946).

<sup>17</sup> *Security Savings Society v. Spokane County*, 111 Wash. 35, 189 Pac. 260 (1920).

<sup>18</sup> *State ex rel. Reynolds v. Hill*, 135 Wash. 442, 237 Pac. 1004 (1925).

and that perhaps the court is merely saying that the Supervisor is within his discretionary powers in limiting the number of licenses in accordance with the demand as that demand is found by him. Question arises then, as to whether the exercise of discretionary power to license *can* be reviewed when the statute provides for it.

In some cases, courts have had an aversion to factual reviews where the issues involve scientific or technical data which require the special skills of the administrator for proper analysis.<sup>19</sup> But the Washington court, in prior cases, has held that technicality and complication are not deterrents to judicial review of the facts and has expressed a willingness to follow the legislative directive where trial *de novo* is provided. And so in *In re Littlefield*,<sup>20</sup> the court directed an examining board to issue a physician's license after holding a trial *de novo* as provided by statute. The appellant contended that the court should not review a fact pattern which involves medical matters but the court answered that technicality is no bar when the intent of the legislature is clear in providing trial *de novo*. The court held that matters of medical detail are well within the court's power of review and cites its findings on criminal insanity as an example. To the same effect is *Russel v. Dibble*<sup>21</sup> where the Washington court, in denying mandamus for a medical license because it found the *de novo* provision adequate, stated that statutory provisions for appeal *de novo* should be liberally construed.

Another possible explanation of why the court would not review the discretionary acts of the Supervisor is the judicial aversion against encroaching on the police power. This seems to be the reason emphasized by the majority. In general, the legislature has a rather clearly defined power to regulate or even prohibit certain activities which are deemed detrimental for some reason or another.<sup>22</sup> The court in the instant decision finds that his power can put administrative action above judicial review for all but arbitrary and capricious misconduct. It is true that the legislature may expressly prohibit an activity or allow it under closely controlled conditions. If that activity is then allowed under license, the opportunity to engage is a privilege, not a right. With no right to engage, the applicant has no right which the court can protect, and hence the court cannot properly order the

<sup>19</sup> *California Co. v. State Oil & Gas Board*, 200 Miss. 284, 27 So. 2d 542 (1946).

<sup>20</sup> 61 Wash. 150, 112 Pac. 234 (1910).

<sup>21</sup> 132 Wash. 51, 231 Pac. 18 (1924).

<sup>22</sup> *Bungalow Amusement Co. v. Seattle*, 148 Wash. 485, 269 Pac. 1043 (1928).

license issued.<sup>23</sup>

If the small loan business is an endeavor that exists at the pleasure of the legislature, where did that status come from? There is nothing inherently wrong with lending money. A particular small loan agency may constitute a public nuisance, but this would stem from the particular practices involved and not from small lending *per se*.<sup>24</sup> Common law usury has always been an objectionable factor in business practices, but as was stated in *Acme Finance Company v. Huse*,<sup>25</sup> there is no necessary connection between small lending as a business and the illegality of usury. Usury is no more lawful in large loan contracts than it is in small ones.

The Uniform Small Loan Act, as promulgated by the Russel Sage Foundation, provided statutory appeal only for those cases where the Supervisor was arbitrary and capricious;<sup>26</sup> but the Washington legislature saw fit to provide a *de novo* review subject to no special qualification. Granting that the court cannot issue a license, does it not seem (in view of the fact that the legislature is bound to know this) that trial *de novo* is an expression of legislative desire for the court to have some control of the Supervisor and as a result, the statutory words of discretion are more a matter of law so that the court is to have some say in deciding whether a license shall issue? In *Kelleher v. Minshull*, the appellant contended that the statute was illegal because it subjected the small loan business to arbitrary regulation; but the court answered by saying that the power of the Supervisor is limited by the trial *de novo* provision.

As a result of this case, new applicants for small loan licenses may be denied a hearing entirely. The Supervisor may wish to grant a hearing at the administrative level, but there is no compulsory provision which the applicant can invoke. Since the Supervisor, in determining "convenience and advantage" must make findings of fact, the applicant should have a right to submit testimony and evidence; and he should have a right to urge his side of the bargain.<sup>27</sup> This is the sum and substance of his procedural right to a day in court.<sup>28</sup> There is still an appeal provision, but it can only be invoked to show arbitrary and capricious misconduct. It does not give the applicant a right to

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<sup>23</sup> *Ibid.*

<sup>24</sup> *State v. O'Neil*, 205 Minn. 366, 286 N.W. 316 (1939).

<sup>25</sup> 192 Wash. 96, 73 P. 2d 341 (1937).

<sup>26</sup> F. B. Hubacheck, ANNOTATIONS ON SMALL LOAN LAWS (1938).

<sup>27</sup> *Mott v. State*, 148 Ga. 55, 95 S.E. 867 (1918).

<sup>28</sup> See *Deutsch v. Department of Insurance*, 397 Ill. 218, 73 N.E. 2d 304 (1947).

urge his side of the case on the merits. According to the *Kelleher* case and the *de novo* provision, the legislature has not exercised its power to make small lending a mere privilege; and as a general proposition, a man who has any rights which stand to be altered or lessened by governmental action has a right to a hearing so that he can present the facts as he sees them.<sup>29</sup> With these general premises, it is urged that the applicant is denied his rights to procedural due process of law, or at least the procedural rights intended by the legislature. If the court was bound to invalidate the *de novo* provision, then should it not have followed the *Acme Finance* case and declared the entire Uniform Small Loan Act unconstitutional?

With the denial of a right to be heard either before the tribunal or a court in the alternative, the instant case may produce ramifications which go beyond small lending. If one cannot urge the tribunal to find his application as meritorious, and if the court cannot review the decision and hear the applicant because this is in fact an administrative duty, then cannot the hearing be denied whether the applicant asks for a license as a doctor, dentist, chiropractic or small lender? Will not this decision apply to all occupations which are subject to administrative licensing? It appears that twenty-seven licensed occupations are covered by statutes with *de novo* appeal provisions.<sup>30</sup> Some of them

<sup>29</sup> *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1919).

<sup>30</sup> (1) Dairy Products. RCW 15.36.580 [REM. SUPP. 1949 § 6266-46b].

(2) Sale of Securities. RCW 21.04.180 [RRS § 5853-16].

(3) Mining Securities: Dealers. RCW 21.08.120.

(4) Gas, Oil & Mining Leases. RCW Chap. 21.12 [RRS § 5853].

(5) Savings & Loan Associations. RCW 33.04.060 [REM. SUPP. 1945 § 3717-234].

(6) Macaroni Products: Producers. RCW 69.16.080, 090 [RRS § 6294-112, 113].

(7) Puget Sound Pilots. RCW 88.16.100 [RRS § 9871-13].

(8) Accountancy. RCW 18.04.260, 320 [REM. SUPP. 1949 § 8269-32-38].

(9) Architects. RCW 18.08.050 [RRS § 8271].

(10) Barbers. RCW 18.15.050.

(11) Beauty Culture. RCW 18.18.110 [RRS § 8278-12].

(12) Chiropody. RCW 18.22.170 [RRS § 10088].

(13) Chiropractics. RCW 18.25.050 [RRS § 10103].

(14) Dental Hygienists. RCW Chap. 18.29 [RRS § 10030-26 *et seq.*].

(15) Dentistry. RCW 18.30.240 [RRS § 10031-9].

(16) Drugless Healers. RCW 18.36.170, 320 [RRS § 10125-1, -6].

(17) Midwifery. RCW 18.50.110 [RRS § 10180].

(18) Optometry. RCW 18.53.080 [RRS § 10150].

(19) Osteopathy. RCW 18.57.200 [RRS § 10052].

(20) Pharmacy. RCW 18.64.170, 200 [RRS §§ 10143, 10144].

(21) Physicians and Surgeons. RCW 18.71.140 [RRS § 10014].

(22) Physical Therapy. RCW Chap. 18.74 [RRS § 10163].

(23) Practical Nurses. RCW 18.78.140 [REM. SUPP. 1949 § 10173-4].

(24) Real Estate Brokers. RCW 18.85.251; RCW 18.85.271.

(25) Maternity Homes. RCW 18.46.050; RCW 18.46.100.

(26) Registered Nurses. RCW 18.88.240 [REM. SUPP. 1949 § 10173-22].

(27) Veterinarians. RCW 18.92.210 [REM. SUPP. 1941 § 10040-15].

provide for *de novo* review expressly,<sup>81</sup> others spell out *de novo* in one form or another.<sup>82</sup>

Of the twenty-seven statutes, ten contain some words of discretion which vest the administrator with something more than ministerial power.<sup>83</sup> The most common example is the requirement of "good moral character" which is found in many of the personal service occupation groups.<sup>84</sup> In view of the court's treatment of the statutory words "convenience and advantage" and in view of the fact that the minimum moral character required is as tenuous to define as is a state of public benefit or advantage, these statutes are surely affected by the *Household Finance* case.

Among these statutes, there may well be a variance of treatment in future cases which is predicated on the status of the occupation as a matter of right. Perhaps one still has more of a right to be a doctor than a small lender, but it should be noted that provision for trial *de novo* of the applicant's case will not, of itself, make the court aware of a legislative intent that an occupation be more than a mere privilege.

Some sixteen statutes provide for a hearing before the administrator and a review *de novo*.<sup>85</sup> If the Washington court follows the rule as stated in the instant case, these *de novo* provisions may become unconstitutional and nothing but the administrative hearing will remain as an equivalent to a day in court. Such an administrative hearing may be sufficient; but provision for a court rehearing of the facts is so common in Washington's occupational statutes as to indicate an unmistakable pattern of legislation. The validity of that pattern is now in serious doubt.

Of even greater consequence is the effect of the instant decision on those statutes where no hearing at the administrative level is provided. There are, including the Small Loan Act, twelve statutes which direct that the licensee's sole chance to present his case shall be before a

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(28) Note that in all of the sections covered by RCW Title 18 (except Veterinarians) where there is only one section of the Revised Code noted, that section provides only for a hearing at the administrative level. However, these sections are among the "trial *de novo* group" because those licenses are issued by the Director of Licenses; and that office is subject to review *de novo* for refusal to issue licenses. See RCW 43.24.120 [RRS § 10864].

<sup>81</sup> See Puget Sound Pilots, note 30 (7) *supra*.

<sup>82</sup> RCW 43.24.120 [RRS § 10864].

<sup>83</sup> Note 30, *supra*, (6), (7), (13), (15), (16), (17), (18), (19), (20), and (22).

<sup>84</sup> See Chiropractics, Drugless Healers, Optometrists, and Osteopaths note 30, *supra*, (13), (16), (18), and (19).

<sup>85</sup> Note 30, *supra*, (1), (2), (7), (8), (10), (11), (13), (15), (17), (18), (19), and (20).

superior court on *de novo* review.<sup>36</sup> Of these statutes, at least four contain words of administrative discretion.<sup>37</sup> If these *de novo* provisions are illegal then is it not reasonable to contend that all twelve statutes are unconstitutional for lack of a hearing on the merits? At the very minimum, it is suggested that this is an incongruous situation and certainly calls for legislative revision of some kind. If the legislature cannot legally specify a trial *de novo*, then some lesser kind of provision for a hearing should be provided such as an administrative trial which the applicant can demand as a matter of right.

In conclusion, it must be noted that the court has sanctioned an interpretation of "convenience and advantage" which is based on limiting competition. The Supervisor will be sustained in keeping out new potential lenders unless he oversteps the hazy bounds of arbitrary and capricious misconduct. In view of the fact that no hearing is required, the powers of the Supervisor become very broad indeed. It is not at all beyond the realm of possibility that the time will come when the relationship between the administrator and the then long existing agencies will be entirely too cordial to promote the public convenience and advantage and in that state of affairs, the question arises as to the advisability of controlled competition as the equivalent of "convenience and advantage," i.e. to *what* advantage and to *whose* convenience?

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<sup>36</sup> Note 30, *supra*, (3), (4), (5), (6), (9), (12), (14), (16), (22), (23), (27).

<sup>37</sup> Note 30, *supra*, (6), (16), (22), and (26).