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Philip A. Trautman
University of Washington School of Law

ADMINISTRATIVE LAW PROBLEMS OF DELEGATION AND IMPLEMENTATION IN WASHINGTON

PHILIP A. TRAUTMAN *

> It seems unnecessary to labor the fundamental doctrine of the constitutional division of powers and the reasons therefor. In this state, the legislative power is 'vested in the legislature, consisting of a senate and house of representatives' but with the powers of initiative and referendum reserved to the people (Washington constitution, Art. II, § 1, as amended in 1912 by the seventh amendment); the judicial power of the state is 'vested in the supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide' (Art. IV, § 1); and the executive department consists of the governor and other officers named in Art. III, § 1 of the constitution, with the 'supreme executive power' vested in the governor (Art. III, § 2).[1]

With these words the Washington court in 1952 set forth the doctrine of separation of powers. This is the doctrine which during an earlier period rose to plague those desiring to establish administrative agencies. The contention was raised that as the administrative process often consisted of a combination of legislative and judicial powers, the system was unconstitutional.

That the separation doctrine serves a needed function in preventing one person or group from exercising the whole of the legislative, executive and judicial powers, few, if any, would deny. That the legislative branch should not exercise wholly the judicial or executive powers or that the executive should not exercise wholly the judicial or legislative powers, most, if not all, would agree. But it seems equally clear that to distinguish in every instance what is legislative, what is judicial and what is executive borders on the impossible. Even granting that such a distinction can be made in a particular case, it is doubtful that anyone would now contend that a part of each of these functions should in no instance be vested in any one body.

The Washington court has stated that the complete separation of governmental powers into the legislative, the executive, and the judicial is impossible.[2] The reasons given for this have been many and varied: the practical necessities of government, combined with the impracticability of defining the three powers, require some mingling and overlapping of powers;[3] the complex relations created

* Assistant Professor of Law, University of Washington.

[1] Household Finance Corp. v. State, 40 Wn.2d 451, 455, 244 P.2d 260, 262 (1952).

[2] State ex rel. Washington Toll Bridge Authority v. Yelle, 195 Wash. 636, 82 P.2d 120 (1938).

[3] Household Finance Corp. v. State, 40 Wn.2d 451, 244 P.2d 260 (1952).

by modern society necessitate the combining of powers;[4] while there is no question but that the constitution recognizes a division of the powers of the state into three separate co-ordinate departments, it is well established that the special jurisdiction of each is undertood to be applied in a limited sense, and it is not meant that they must be kept wholly and entirely distinct without any connection or dependence whatever or connecting link between them.[5]

This is not to say that there have not been expressions to the contrary.[6] But it indicates that the Washington court has recognized, as have other courts, the necessity and desirability of combining powers in one person or group in some situations. Moreover, it has been recognized and judicially approved that under some circumstances it is necessary and desirable that persons or groups other than those mentioned in the constitution, i.e., the senate, house of representatives, courts, and governor, should exercise governmental powers. Out of this recognition has come the administrative agency and process.[7]

It is the purpose of this article to examine the bases upon which the Washington court has approved or disapproved the granting of power to persons and agencies other than those specified in the constitution—delegation, and to note generally the limitations which have been placed upon those persons and agencies in exercising the powers granted to them—implementation.

WHAT KIND OF POWER

While conceding that it is frequently subject to valid argument whether a particular power is legislative or judicial in character, still, for the purpose of analyzing the cases, that differentiation, or an attempt at such differentiation, will be made. In this attempt the Washington court has likewise participated.

Though perhaps self-evident, it should be noted that it is what the court defines as legislative or judicial that is the important considera-

[4] State ex rel. Washington Toll Bridge Authority v. Yelle, 195 Wash. 636, 82 P.2d 120 (1938).

[5] State ex rel. Abbott v. Ross, 62 Wash. 82, 113 Pac. 273 (1911).

[6] "The legislative, executive, and judicial functions have been carefully separated, and notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives, and at the same time studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or the courts." In re Bruen, 102 Wash. 472, 478, 172 Pac. 1152, 1154 (1918).

[7] "It is the fusion of the different types of governmental power to deal with specific problems which has resulted in the development of the administrative process...." Household Finance Corp. v. State, 40 Wn.2d 451, 455, 244 P.2d 260, 263 (1952).

tion, rather than what the legislature or an agency or any individual thinks. This is evidenced by the statement, "[W]hether a function is legislative or administrative, is strictly a judicial question."[8]

The court has recently stated that the character of a power is determined by the nature of the act performed, rather than by the name of the officer or agency which performs it. The judicial power is characterized by investigation and the declaration and enforcement of liabilities as they stand on present or past facts and under laws supposed already to exist. The legislative power is characterized by an act looking to the future and changing existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[9] When a power is exercised by an agency, rather than by the legislature or a court, and fits either definition set out above, it is designated as quasi-judicial and quasi-legislative respectively.

It is this characterization and definition that will be used in considering the powers exercised by administrative agencies in this state, with the understanding that when exercised by an agency the word "quasi" must be added.[10]

THE MAGIC OF STANDARDS

It has often been recognized and stated that insofar as the federal government is concerned the delegation of powers to administrative agencies is no longer a problem, or for that matter, never has been to any great extent. In only three cases has the United States Supreme Court found congressional delegations to be unlawful. All three were decided in 1935-36.[11] On the state level there has been and there still is a problem. It is a matter which every attorney should keep in mind whenever he is dealing with an administrative agency. May the particular power be delegated to the agency? Assuming that it may, has that power been properly implemented by the agency?

A superficial examination of almost every case involving the question of whether there has been proper delegation will disclose the court

[8] State ex rel. Payne v. Spokane, 17 Wn.2d 22, 24, 134 P.2d 950, 951 (1943).

[9] Floyd v. Department of Labor and Industries, 44 Wn.2d 560, 269 P.2d 563 (1954). In the case the court set out certain tests for determining what type of power an administrative agency is exercising: could a court have been charged in the first instance with the responsibility of making the decision the administrative agency must make; is the function the agency performs one that courts historically have been accustomed to perform and had performed prior to the creation of the administrative body?

[10] An application of this principle is found in Selde v. Lincoln County, 25 Wash. 198, 65 Pac. 192 (1901).

[11] See DAVIS, HANDBOOK ON ADMINISTRATIVE LAW 42 (1951).

saying that there must be standards to guide the agency in its work.[12] If a standard is present, the legislature has legislated and the agency is exercising solely an administrative function when it acts under that standard. If standards are absent, the agency is acting in a legislative capacity and the attempted delegation is unconstitutional. This would seem to make the problem easy of solution. One need simply look at the statute and see if a standard is prescribed.

The difficulty arises when one examines the cases to determine what wording constitutes a standard and what does not. In *State ex rel. Washington Toll Bridge Authority v. Yelle*[13] the state toll bridge authority was authorized to provide for the construction of toll bridges whenever the bridges were considered "necessary or advantageous and practicable" for crossing certain bodies of water. This was held to be a valid standard as declaring the legislative purpose, leaving the agency only to fill in the details.

Likewise, when the insurance commissioner was authorized to fix insurance rates deemed by him to be "proper and adequate to cover the class of risk insured";[14] when a state railroad commission was authorized to order railroads to make certain track connections between their lines which the commission found to be "just, fair, and reasonable";[15] when the state medical board was authorized to revoke a doctor's license for advertising "intended or having a tendency to deceive credulous or ignorant persons and so be harmful to public morals or safety";[16] when a special state committee was established to approve or disapprove of the formation of new school districts and alteration of boundaries of established districts upon the basis of whether the planned change was "fair and equitable";[17] when the supervisor of banking was authorized to issue a license to a small loan company if he found "the financial responsibility, experience, character, and general fitness of the applicant . . . are such as to command the confidence

[12] In Keeting v. Public Utility District No. 1, 49 Wn.2d 761, 306 P.2d 762 (1957), the court set forth the most current test on the delegation problem in this state. The legislature must define (a) what is to be done, (b) the instrumentality which is to accomlish it, and (c) the scope of the instrumentality's authority in so doing, by prescribing reasonable administrative standards. See also the recent case of Washington Toll Bridge Authority v. State, 49 Wn.2d 520, 304 P.2d (1956), in which the court, after finding a statute to be unconstitutional as embracing two subjects, intimated that where the legislature authorized an agency to extend toll road projects in such sections or stages as the agency might from time to time determine, there were inadequate standards to guide the agency.

[13] 195 Wash. 636, 82 P.2d 120 (1938).

[14] Continental Insurance Company v. Fishback, 154 Wash. 269, 282 Pac. 44 (1929).

[15] State ex rel. Oregon Railroad & N. Co. v. Railroad Commission, 52 Wash. 17, 100 Pac. 179 (1909).

[16] State Board of Medical Examiners v. Macy, 92 Wash. 614, 159 Pac. 801 (1916).

[17] Wheeler School District v. Hawley, 18 Wn.2d 37, 137 P.2d 1010 (1943).

of the community . . . and that allowing such applicant to engage in business, will promote the convenience and advantage of the community . . .";[18] and when the department of labor and industries was authorized to declare an occupation within the state workmen's compensation act if the occupation was "inherently and constantly dangerous,"[19] the court found that there were adequate standards to guide the agencies.

One might conclude from such cases that the requirement of standards is met so long as some guide is prescribed, regardless of the broadness or vagueness of the terminology. Such a generalization is impossible in view of cases such as *State ex rel. Makris v. Superior Court*[20] and *State v. Gilroy*.[21] In the *Makris* case, a Tacoma ordinance gave the commissioner of public safety the power to revoke the license of any business "for disorderly or immoral conduct or gambling on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary." The court stated that, other than the clause as to gambling, the ordinance prescribed no rule to guide the commissioner. That the wording is most general may be granted. That it is less definite than the phraseology contained in the cases cited in the previous paragraph is difficult to concede.

More perplexing is *State v. Gilroy*. In that case the director of social security was empowered to issue certificates of approval to persons seeking to carry on the work of caring for children and adults and placing children for care. The statute provided that in determining whether to issue a certificate, the director should consider "the good character and intentions of the applicant; the present and prospective need of the service intended by the proposed organizations with no unnecessary duplication of approved existing service; provision for employment of capable, trained or experienced workers; sufficient financial backing to insure effective work; the probability of permanence in the proposed organization or institution; that the methods used and the disposition made of the children will be in their best interests and that of society; articles of incorporation and related by-laws; that in the judgment of the director the establishment of such an organization is necessary and desirable for the public welfare." One

[18] Kelleher v. Minshull, 11 Wn.2d 380, 119 P.2d 302 (1941).
[19] State v. Bayles, 121 Wash. 215, 209 Pac. 20 (1922). Compare State v. Powles & Co., 94 Wash. 416, 162 Pac. 569 (1917), in which analagous standards were held invalid.
[20] 113 Wash. 296, 193 Pac. 845 (1920).
[21] 37 Wn.2d 41, 221 P.2d 549 (1950).

might assume that surely the magic requirement of standards was met. The court, however, found an unconstitutional delegation of the legislative function by reason of the failure of the legislature to set up proper guides to govern the director's discretion.

One is left with the conviction that no matter how many times the court says that the determining factor is the presence or absence of standards, an inquiry as to the terminology alone will not solve the problem. Other matters evidently bear upon the question of whether the delegation in a particular case is proper or improper.

DELEGATION OF LEGISLATIVE POWER

A consideration of the factors which individually or in variable combinations affect the determination of whether delegation is valid requires that one principle often reiterated in the Washington cases be noted. While the legislature cannot delegate its power to make a law, it can delegate the power to determine some fact or state of things upon which the application of the law depends.[22]

As an example of the application of this principle, in *Carstens v. DeSellem*[23] a statute provided for the disinfection and destruction of trees afflicted with such diseases and pests as the commissioner of agriculture should declare to be injurious to the horticultural interests of the state. A contention that this constituted an unconstitutional delegation of power was answered by the proposition that the legislature declared the law in providing for the destruction and simply left it to the commissioner to determine the facts as to which diseases were injurious.

The principle is more commonly called upon when a statute authorizes the determination by some group other than the legislature of when or where a law is to take effect. A statute provided for elections to determine if public utility districts should be created co-extensive with the boundaries of counties. The board of county commissioners was empowered to determine when to call the election, with the proviso that it should do so upon a petition signed by 10 per cent of the qualified electors of the county. The court stated that this left to the local agency only the power to determine when the law should go into effect,

[22] This principle is enunciated in many cases. See Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595 (1920), involving an order setting minimum weekly wage rates and standards of conditions of labor for women; State ex rel. Washington Toll Bridge Authority v. Yelle, 195 Wash. 636, 82 P.2d 120 (1938); Morgan v. Department of Social Security, 14 Wn.2d 156, 127 P.2d 686 (1942); Vail v. Seaborg, 120 Wash. 126, 207 Pac. 15 (1922); Senior Citizens League, Inc. v. Department of Social Security, 38 Wn.2d 142, 223 P.2d 478 (1951).

[23] 82 Wash. 643, 144 Pac. 934 (1914).

not what the law was to be.[24] Analagous problems were presented when a statute made it unlawful for livestock to run at large in any county where three-fourths of the land was under fence, the determination of whether three-fourths was under fence to be made by the board of county commissioners when 10 or more freeholders made application therefor,[25] and when an ordinance prohibited the keeping of a livery stable in a block in which two-thirds of the buildings were used for residence purposes, unless the owners of a majority of the lots in such block consented thereto.[26] In both cases the court stated there was delegation only to determine when a law was to take effect.

In *Cawsey v. Brickey*[27] county game commissions were authorized to set aside limited game preserves wherein no game bird, animal or fish could be taken except at such times as the commissions might determine. Here the power delegated was that of determining where a law should operate rather than when. The court held this to be proper.[28]

It is submitted that, insofar as the principle that the legislature can delegate the power to determine facts upon which the law depends but not the power to make law itself, is applied to situations involving questions of where or when a law shall be operative, it may well be of aid for analytical purposes. When applied more generally, however, the question of what is fact and what is law poses such a problem as to render the principle of even less value than the requirement of standards. Some other explanation for valid and invalid delegations of power must be sought.

Necessity. In numerous instances the best explanation that can be offered for upholding delegation is simply one of necessity. A prime example of this is found in *State ex rel. Foster-Wyman Lumber Company v. Superior Court*,[29] in which a statute authorizing the supreme court to make rules relating to pleading, practice and procedure was held to be constitutional. It was emphasized that due to the short biennial sessions the legislature was unable to adequately formulate

[24] Royer v. Public Utility District No. 1, 186 Wash. 142, 56 P.2d 1302 (1936).
[25] State v. Storey, 51 Wash. 630, 99 Pac. 878 (1909).
[26] Spokane v. Camp, 50 Wash. 554, 97 Pac. 770 (1908).
[27] 82 Wash. 653, 144 Pac. 938 (1914).
[28] Compare Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 23 Pac. 405 (1890), holding invalid a statute which authorized the creation of a municipal corporation by a court upon petition of a majority of the inhabitants of the territory to be incorporated. "While a statute may be conditional and only take effect upon the happening of a future event, we hold that the place where it is to operate, its 'situs' must be fixed definitely by the legislature itself or delegated to some body or agency capable of exercising legislative functions..."
[29] 148 Wash. 1, 267 Pac. 770 (1928).

rules as they were needed. Along the same line is *State ex rel. Great Northern Ry. Co. v. Railroad Commission,*[30] wherein the state railroad commission was authorized to set maximum rates to be charged by railroads. Due to the rapidly changing conditions in transportation, flexible rates were necessary. The legislature in its short periodic meetings was unable to supply this needed flexibility, and with this consideration in mind the delegation was allowed.[31]

Even if the subject matter is static in character and, from the standpoint of time, the legislature is able to adequately deal with a problem in its biennial sessions, there are situations in which the legislature lacks the information to competently cope with a problem by statute. It is then necessary that some other body be allowed to supplement the statute by rules and regulations. In *State ex rel. Foster-Wyman Lumber Co. v. Superior Court, supra,* the supreme court was better qualified by experience to promulgate rules of court than was the legislature. Likewise, in other situations it is deemed necessary to have experts promulgate rules. It has been held that in order to take advantage of expert opinions, health boards may be delegated the power to define, classify, and quarantine diseases,[32] and a state railroad commission may be authorized to order the construction of stations and to generally regulate the broad and complex field of transportation, wherein expert knowledge, not possessed by the legislature, is a requisite.[33]

In at least one instance the court has gone so far as to uphold delegation simply on the basis that this would be more convenient.[34] More commonly, however, one seeking to sustain delegation of power must go further and establish that it is impossible, or at least impractical, for the legislature to declare a more definite and comprehensive rule.

This is illustrated very well by a comparison of *Senior Citizens League v. Department of Social Security*[35] and *State v. Gilroy.*[36] In the *Senior Citizens League* case the problem was one of setting standards to guide the department of social security in fixing the amount of grants to be allowed applicants for public assistance. In the *Gilroy*

[30] 52 Wash. 33, 100 Pac. 184 (1909).

[31] See also Carstens v. DeSellem, 82 Wash. 643, 144 Pac. 934 (1914) (commissioner of agriculture authorized to specify diseases requiring disinfection or destruction of trees); Vail v. Seaborg, 120 Wash. 126, 207 Pac. 15 (1922) (state fisheries board authorized to establish rules governing the taking of fish).

[32] State ex rel. McBride v. Superior Court, 103 Wash. 409, 174 Pac. 973 (1918).

[33] State ex rel. Railroad Commission v. Great Northern Ry., 68 Wash. 257, 123 Pac. 8 (1912).

[34] Nelson v. Troy, 11 Wash. 435, 39 Pac. 974 (1895).

[35] 38 Wn.2d 142, 228 P.2d 478 (1951).

[36] 37 Wn.2d 41, 221 P.2d 549 (1950).

case it was one of setting standards to guide the director of social security in granting certificates authorizing child care agencies. The court required much more in the way of definiteness of standards in the latter case. One reason for this was that it was deemed impractical for the legislature to be very specific in the broad, complex field of public assistance, whereas such was not true in the more simple, static matter of child care agencies.

Character of the Business. The character of the business which it is sought to regulate through administrative agencies may have a decided effect upon the delegation question. In *State ex rel. Lane v. Fleming*[37] an ordinance authorized a city council to deny permits for the erection of gasoline service stations if this would be against the "public interest." In upholding this nebulous standard as a guide for the council, the court emphasized the dangerous nature of service stations.

In a statute authorizing the state liquor board to issue class H licenses for the sale of intoxicating liquor by the drink, broad standards were provided. This gave the board much discretion in determining who should get a license. The court upheld the delegation, at the same time stressing that the nature of the business justified such standards. There was even an intimation that no standards would have been necessary.[38]

Other cases in which the court has stressed the nature of the business involved in sustaining the delegation of authority are *Bungalow Amusement Company v. Seattle*[39] and *State ex rel. Sayles v. Superior Court.*[40] In the former a chief of police was authorized to refuse to issue a dance hall permit or to cancel or revoke a permit for any reason which in his opinion would be detrimental to the public peace, health, or welfare. In the *Sayles* case the court sustained an ordinance providing for the licensing of pool and billiard halls, there being no standards whatsoever.

Seattle v. Gibson[41] sets a striking contrast. In the *Gibson* case an ordinance provided for the licensing of druggists with the wording of the ordinance being almost exactly the same as that in the *Sayles* case.

[37] 129 Wash. 646, 225 Pac. 647 (1924).

[38] Randles v. State Liquor Control Board, 33 Wn.2d 688, 206 P.2d 1209 (1949). See also State ex rel. Thornbury v. Gregory, 191 Wash. 70, 70 P.2d 788 (1937), sustaining a state liquor board regulation prohibiting the sale of beer and wine at certain hours. Compare Derby Club, Inc. v. Beckett, 41 Wn.2d 869, 252 P.2d 259 (1953), wherein a statute was held unconstitutional in providing that a license must be procured before operating a bottle club, there being no provision authorizing the state liquor control board to issue any such license.

[39] 148 Wash. 485, 269 Pac. 1043 (1928).

[40] 120 Wash. 183, 206 Pac. 966 (1922).

[41] 96 Wash. 425, 165 Pac. 109 (1917).

The ordinance was held to be an unconstitutional delegation of power. Operating a drug store is a lawful activity and the legislature may not delegate to any person or group of persons the discretion to determine who may or may not engage in that business, without providing some guiding standards. The only apparent difference between the two cases is the character of the occupation affected—pool and billiard halls as contrasted with drug stores.

Likewise, the commissioner of public safety could not be given the power to revoke a license for the business of selling candy and soft drinks "for disorderly or immoral conduct . . . on the premises, or whenever the preservation of public morality, health, peace or good order shall in his judgment render such revocation necessary."[42] Nor could a city council be given the discretion to grant and revoke licenses for amusement parks.[43] In each instance there was a lawful business, thereby requiring a stricter standard than is necessary in the case of pool halls, dance halls, and the sale of intoxicating liquor.[44]

Right-Privilege. Another means of analyzing those cases wherein the character of the business was seemingly determinative of the delegation question is by use of the right-privilege distinction. One may classify the sale of intoxicating liquor and the operation of a pool hall as a privilege, whereas the operation of a drug store or candy shop is a right. The importance of this distinction is perhaps best illustrated by again comparing *Senior Citizen's League v. Department of Social Security, supra,* relating to public assistance, with *State v. Gilroy, supra,* relating to child care agencies. The receipt of public assistance is a privilege requiring less in the way of standards than the regulation of child care agencies, the operation of which the court designated as a right. Or as the court phrased the principle, "Where the statute deals only with a privilege which the state is free to withdraw completely at any time, the courts are less strict in the application of the delegation principle than where the statute affects an established personal or property right."[45]

This distinction was also relied upon in *State ex rel. Schafer v. Spokane,*[46] wherein a city council was empowered in its discretion to license motor vehicles for hire. Not only were no standards prescribed, but

[42] State ex rel. Makris v. Superior Court, 113 Wash. 296, 193 Pac. 845 (1920).
[43] Vincent v. Seattle, 115 Wash. 475, 197 Pac. 618 (1921).
[44] See also Continental Insurance Co. v. Fishback, 154 Wash. 269, 282 Pac. 44 (1929) (insurance business); State ex rel. Jordan v. Department of Licenses, 130 Wash. 82, 226 Pac. 275 (1924) (dentistry).
[45] Senior Citizens League v. Department of Social Security, 38 Wn.2d 142, 165, 228 P.2d 478, 491 (1951).
[46] 109 Wash. 360, 186 Pac. 864 (1920).

here was a business of a clearly lawful character. Nevertheless, the court upheld the delegation. While there is a right to travel upon highways and transport property thereon, the use of the public highways for private gain is a concession, a privilege. Such being true, the legislature could delegate more power than would otherwise be true.

Admittedly, the right-privilege concept presents difficulties. If the court has previously labeled a particular activity, one may presumably act accordingly in solving the delegation problem. In those instances where the court has not yet spoken, one cannot be sure whether the matter regulated is a right or privilege. Nonetheless, there can be little doubt but that the distinction must be kept in mind by the attorney when confronted with a delegation issue.

Police Power.

> It is not always necessary that statutes and ordinances prescribe a specific rule of action. This is particularly true in those situations . . . where the discretion to be exercised by an administrative officer relates to a regulation imposed for the protection of public morals, health, safety, and general welfare.[47]

This statement evidences another factor to be considered—the police power.

In *Brown v. Seattle*[48] an ordinance authorized the commissioner of health to issue permits to operate meat markets if the applicant was found to be "responsible and trustworthy." The court distinguished the cases involving pool halls, dance halls and card rooms, where strict regulation and supervision was required because of the nature of the business regulated. But, upon the ground of protecting the public health, the delegation was upheld. On a similar basis, delegation was sustained where the state health board was empowered to quarantine for diseases to be determined by the board, the court saying, "It is settled that laws and ordinances creating the boards of health and granting wide powers for the effective and effectual carrying out of the legislative plan for protecting health, must be liberally construed."[49]

Procedure. Is the procedure whereby the agency exercises its power fair and proper? Insofar as it is deemed inadequate to protect the interests of the individuals affected by the administrative action, this may be the determining factor. As an example, the fact that a license is subject to be revoked without a hearing provides an added reason

[47] Kelleher v. Minshull, 11 Wn.2d 380, 397, 119 P.2d 302, 309 (1941).
[48] 150 Wash. 203, 272 Pac. 517 (1928).
[49] State ex rel. McBride v. Superior Court, 103 Wash. 409, 427, 174 Pac. 973, 979 (1918).

for declaring invalid a delegation of power.[50] The presence or absence of a provision for review by the courts of agency action may have a considerable bearing.[51] In short, although the court seldom makes specific reference to the matter, one must examine the procedural safeguards provided for by the enabling statute or ordinance in solving the delegation question.

Miscellaneous. Other matters of a more intangible nature may enter the picture. Does the court have confidence in the agency to which the delegation has been made? To what type of person or body is the power given? Is it an important state agency or a local inferior official? In what way is the person or group subject to the will of the people? Is the official exercising the power elected or appointed? Is the power one which historically has been exercised by a body other than the legislature?[52]

These, then, are the factors which have influenced the Washington court. It should be noted that a contention that an agency may adopt arbitrary rules is not sufficient to make invalid a delegation of power. The court will not presume that an administrative agency will act arbitrarily and unreasonably.[53]

It should also be noted that while the court's characteristic language, that the validity of delegation is dependent upon the standards established, is an extremely difficult concept to apply, in those instances wherein there are no standards prescribed whatsoever, one may have a much easier task in sustaining an attack upon a statute or ordinance. This is not to say that there are not cases upholding such statutes. Some have been cited herein. But, absent any standards whatever, there being simply a grant of power with no guides for the agency, the court is seemingly much more willing to reject a statute without the necessity of evaluating the considerations previously mentioned.

In the early thirties the legislature enacted an agricultural adjustment act. The act vested in the state director of agriculture and the governor the power to make rules and regulations for the production, sale and disposition of agricultural products and to fix prices, issue

[50] See State ex rel. Makris v. Superior Court, 113 Wash. 296, 193 Pac. 845 (1920).

[51] See Kelleher v. Minshull, 11 Wn.2d 380, 119 P.2d 302 (1941), where a statute authorizing the supervisor of banking to issue, deny, revoke or suspend the license of a small loan company provided for a de novo review in the superior court. This de novo review is one of inquiring whether the supervisor has acted arbitrarily, capriciously or contrary to law rather than being a completely new trial on the law and facts. Household Finance Corp. v. State, 40 Wn.2d 451, 244 P.2d 260 (1952).

[52] See Nelson v. Troy, 11 Wash. 435, 39 Pac. 974 (1895).

[53] In re Thompson, 36 Wash. 377, 78 Pac. 899 (1904); State ex rel. McBride v. Superior Court, 103 Wash. 409, 174 Pac. 973 (1918).

licenses and permits, and classify basic agricultural commodities, with the added power to exclude products from the operation of the act. The purpose of the statute was to reestablish prices to farmers at a level that would give agricultural commodities a purchasing power equivalent to that of a basic, pre-war period, 1909-1914. Certainly the necessities of the time—the emergency of the depression and the financial crisis of the agricultural interests—were a pressing argument for upholding the delegation. Nevertheless, the statute was held to be unconstitutional.[54] Presumably, the reason was the broadness of the delegation—the discretion to do whatever was necessary to help the farmer—combined with the total absence of standards to guide the director and governor.

It is submitted that, absent any standards, one may well be successful in this state in attacking a statute or ordinance delegating legislative power. If standards are prescribed, then no matter how broad and vague the terminology, it becomes necessary to consider such factors as the necessities of the occasion, the character of the business affected, the right-privilege distinction, the police power, the procedural safeguards, and such miscellaneous intangible matters as the confidence of the court in the agency and the character of the person or board exercising the power.

Delegation of Judicial Power

An analysis of the delegation of judicial powers in Washington should begin with a statement of the court made in 1891.

> The judicial power of the late territory of Washington was vested by the organic act in a supreme court, district courts, probate courts, and in justices of the peace.... It follows, therefore, that boards of county commissioners could not have been clothed with judicial powers or functions, even by an act of the legislature....[55]

In the same year it was stated that the jurisdiction of the courts, created by the constitution, covered the whole domain of judicial power. The legislature had the power under the constitution to transfer from one constitutional court to another constitutional court portions of the judicial power.[56]

[54] Uhden, Inc. v. Greenough, 181 Wash. 412, 43 P.2d 983 (1935); Griffiths v. Robinson, 181 Wash. 438, 43 P.2d 977 (1935). Other cases holding delegations invalid where there were no standards are State ex rel. Everett Fire Fighters v. Jordan, 46 Wn.2d 114, 278 P.2d 662 (1955); State ex rel. Kirschner v. Urquhart, 150 Wash. Dec. 115, 310 P.2d 261 (1957); State ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 73 L. Ed. 210, 49 Sup. Ct. 50 (1928), *reversing* 144 Wash. 74, 256 Pac. 781 (1927).

[55] Ferry v. County of King, 2 Wash. 337, 341, 26 Pac. 537, 538 (1891).

[56] In re Cloherty, 2 Wash. 137, 27 Pac. 1064 (1891).

From these cases one might conclude that in this state it is only the courts that can exercise judicial power and that while the legislature may transfer parts of that power from one court to another, such a transfer can not be made to any individual or group other than a court.

What the court actually had in mind on this delegation matter was clarified by a statement in a later case.

> It has been common for courts to use expressions to the effect that judicial powers could not be conferred upon bodies other than courts under constitutions with provisions similar to ours; but the term 'judicial powers' has not, by the constitution, been defined, nor do we think it is susceptible of any specific definition. Section 1 of article 4 of the constitution evidently means that the judicial power of the state which is exercised by courts shall be vested in the supreme and superior courts and justices of the peace and such inferior courts as the legislature may provide. It is more in the nature of a declaration of the names of courts than it is of a definition of judicial power; and this article of the constitution must have been enacted with the knowledge that quasi-judicial powers have from time immemorial been conferred upon administrative bodies and officers, such as assessors, boards of county commissioners, boards of equalization, auditors, and even sheriffs, who frequently have to decide as to the value of property in cases of exemptions and in other respects.[57]

These early cases set forth a principle which undoubtedly still states the law in this state and which is most difficult to refute. Judicial powers may not be delegated; quasi-judicial powers may. As in the case of legislative powers, the addition of the word "quasi" aids little, however, in solving any particular delegation problem confronting an attorney. As with legislative powers, other factors must be considered.

The court has sometimes set forth the formula that an administrative agency may be delegated the power to determine facts, whereas the courts retain the final power to determine questions of law.[58] As to any particular matter, by labeling it as a question of fact, delegation can be sustained on the basis that the agency is exerting an administrative rather than a judicial function.

When the state land commissioner was authorized to cancel state

[57] Bellingham Bay Improvement Company v. City of New Whatcom, 20 Wash. 53, 57, 54 Pac. 774, 775 (1898). The distinction between judicial and quasi-judicial powers is also made in State ex rel. Abbott v. Ross, 62 Wash. 82, 113 Pac. 273 (1911).

[58] "The substance of our holding has been that the ascertainment of the facts are, subject to certain qualifications, left to the commission, while the determination of law has been retained in the courts. This was as far as the legislature could go, because it could not take from the courts the right to determine the law. Neither may courts surrender the duty imposed upon them by the constitution to determine the law." In re Employees of Buffelen Lumber & M. Co., 32 Wn.2d 205, 209, 201 P.2d 194, 197 (1948).

oyster deeds and to order that lands should revert to the state when used for any purpose other than oyster culture, the commissioner was determining a fact and the delegation was valid.[59] Likewise, when the commissioner of unemployment compensation determined that the only reason for the unemployment of certain persons was that they refused to pass through a picket line, the commissioner was determining a fact.[60] However, when a commission acting under the unemployment compensation act made a determination that certain employees were not voluntarily unemployed, this was not a mere determination of fact, but rather an application of law to facts.[61]

While it may not be too difficult to accept the analysis of fact and law in the above cases, still the determination of the delegation problem by reference to the mental act which an officer performs hardly seems to be an adequate solution. The difficulty is illustrated by a case wherein a statute provided that the superior court should determine whether a person was insane and should be committed to a hospital. In addition, the court was to decide whether that person or his relatives had the ability to pay for his care and maintenance. This was held to be a purely judicial function. The statute also provided that, after commitment, the superintendent of the hospital was to determine whether the person was violently insane and dangerous to life and property. This was necessary in that under the statute, if violently insane, the patient's care was to be paid for by the state; if not, by the county. The determination of violent insanity was said to be a question of fact and an administrative matter.[62] Why the initial insanity question was a judicial matter and the existence of violent insanity was an administrative matter is difficult to explain.

The moral, however, seems obvious. If one is seeking to sustain delegation, adopt the position that a question of fact is involved.[63] If seeking to overthrow delegation, contend that there is a question of law. While in some instances what is fact and what is law may be agreed upon by most persons, in other instances which is which will

[59] State ex rel. Abbott v. Ross, 62 Wash. 82, 113 Pac. 273 (1911).
[60] In re St. Paul & Tacoma Lmbr. Co., 7 Wn.2d 580, 110 P.2d 877 (1941).
[61] In re Employees of Buffelen Lumber & M. Co., 32 Wn.2d 205, 201 P.2d 194 (1948).
[62] State ex rel. Department of Finance, Budget & Business v. Thurston County, 199 Wash. 398, 92 P.2d 234 (1939).
[63] The industrial insurance commissioner classified an injury as a permanent partial disability. This was held to be a question of fact. "Notwithstanding the persuasive argument of counsel for respondent that this court has assumed to itself functions of legislators in determining what facts determined by the commission are reviewable by the court, and that the doctrine that all findings of fact of an administrative commission are to be treated as sacrosanct, is both absurd and dangerous, we consider it inadvisable to vacillate from the well-established rule." Taylor v. Industrial Insurance Commission, 120 Wash. 4, 12, 206 Pac. 973, 976 (1922).

probably not be clear until the court labels it. In actuality, it is likely that other matters have influenced the court and certainly they should be considered by the attorney in presenting his case.

Practical Considerations. Often the reason for upholding the delegation of judicial power is simply that of practicality. One aspect of this is that, if the courts were required to exercise every power of a judicial nature now exercised by administrative agencies and officers, it is likely that the courts would be encumbered with litigation to such an extent that they would be unable to handle the business confronting them.[64]

On the other hand, from the standpoint of the litigants, the delegation of judicial powers to administrative agencies is sometimes necessary to provide them a speedy, efficient, and economical remedy. In *Hanson v. Soderberg*[65] the court upheld a statute authorizing the state bank examiner to determine the necessity for making an assessment on stock of an insolvent bank and the amount of such assessment without a court inquiry. The court stated this was in the best interests of the creditors and stockholders in order to prevent delays and expense. Likewise, the workmen's compensation act was upheld against a contention of invalid delegation, the court stating that the workmen needed a remedy that was certain, speedy, and adequate.[66]

Even if a court has the time to adequately handle a matter, there are instances where it lacks the information to properly decide a question. In such situations the necessity of experts who have experience and special knowledge is a reason for allowing the delegation of judicial power.[67]

Nature of the Business; Right-Privilege; Police Power. Other factors which influence the delegation-of-judicial-powers question parallel those involved in the delegation of legislative power. Thus, the nature of the business regulated may aid in sustaining delegation. Businesses particularly affecting the public interest, such as railroads, commercial banks, and other public service companies, are especially subject to administrative control.[68] The right-privilege concept is

[64] This factor has been recognized by the court. Bellingham Bay Improvement Co. v. City of New Whatcom, 20 Wash. 53, 54 Pac. 774 (1898); State ex rel. Abbott v. Ross, 62 Wash. 82, 113 Pac. 273 (1911).

[65] 105 Wash. 255, 177 Pac. 827 (1919).

[66] State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645 (1913).

[67] See Robinson v. Olzendam, 38 Wn.2d 30, 227 P.2d 732 (1951); State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 Pac. 544 (1905).

[68] See State ex rel. Oregon-Washington Railroad & N. Co. v. Department of Public Works, 155 Wash. 665, 286 Pac. 39 (1930) (railroads); Hanson v. Soderberg, 105 Wash. 255, 177 Pac. 827 (1919) (banks).

applicable. As an example, the use of public lands is a privilege and the legislature may provide for the administrative determination of who may use such lands and under what conditions.[69]

The police power is sometimes the determining consideration. In *Davison v. Walla Walla*[70] an ordinance providing for the removal of any wooden building that was damaged by fire to any extent equaling 30 per cent of its value, unless the city council should consent to its repair, was held valid though there was no provision for resort to judicial proceedings. Upon the basis of the police power the workmen's compensation act was sustained against a contention of unconstitutional delegation of judicial power. Not only could the doctrine of absolute liability be substituted for liability based on fault, but also the administrative determination of liability could be substituted for a trial by jury.[71]

Character of the Litigants. Is the administrative body determining rights as between an individual and the public or rights as between individuals? The court is more likely to sustain the delegation in the former than in the latter, which is deemed to be the sphere especially reserved for determination by a court.[72]

Procedure. As in the case of the delegation of legislative power, the procedure at the administrative level is vital. If there is an inadequacy in the way of notice or opportunity to be heard or a lack of procedural safeguards at the hearing itself, this will influence the court in determining whether there is proper delegation.

In a similar vein, if the administrative determination is subject to court review, this may lead the court to hold that there has been no delegation of judicial power. This consideration is evidenced in the law-fact formula previously discussed. By relying upon the doctrine that questions of law are subject to final determination by the court and that questions of fact, while subject to administrative ascertainment, must be supported by some evidence and not be clearly arbitrary or capricious, the court may be willing to sustain a delegation. The court has allowed delegation while stressing that it retains the power

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[69] State ex rel. Abbott v. Ross, 62 Wash. 82, 113 Pac. 273 (1911).
[70] 52 Wash. 453, 100 Pac. 981 (1909).
[71] State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101 (1911); State v. Mountain Timber Co., 75 Wash., 581, 135 Pac. 645 (1913). See Brown, *Administrative Commissions and the Judicial Power,* 19 MINN. L. REV. 261, at p. 303 (1934-35).
[72] Bellingham Bay Improvement Co. v. City of New Whatcom, 20 Wash. 53, 54 Pac. 774 (1898).

to review and determine the jurisdiction of the agency.[73] In other cases it has been pointed out that the court reserves the right to interfere with administrative decisions which display a disregard of the material rights of the parties to a controversy.[74] In short, the attorney should examine carefully the provisions for review set forth in the statute or ordinance delegating the power in question.[75]

While delegation of judicial powers may be sustained upon a consideration of the aforementioned factors, an administrative agency may not, of course, assume judicial powers without legislative authorization. A public service commission was authorized to promulgate rules governing the payment of certain charges by railroads to shippers for failure to furnish railway cars. The commission adopted a rule providing that if any dispute should arise between the shipper and carrier with reference to the application of the rules as to charges, a hearing should be held before the commission. This was held to be an unconstitutional assumption by the commission of the legislative power.[76] The court in dictum stated that the legislature could have granted the commission the power to conduct such a hearing. But the commission could not grant itself such power.

IMPLEMENTATION

Granting that a particular power is properly delegated to an administrative agency, what may the agency do and not do under that power? Conceding that the agency has the power to promulgate rules, what limitations are imposed upon the exercise of that quasi-legislative function? Assuming that the agency is empowered to hear and determine a dispute, what restrictions limit the agency in carrying out that quasi-judicial function?

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[73] See State ex rel. Northeast Transportation Co. v. Abel, 10 Wn.2d 349, 116 P.2d 522 (1941). See also North Bend Stage Lines Inc. v. Schaaf, 199 Wash. 621, 92 P.2d 702 (1939) and State ex rel. Public Utility District No. 1 v. Department of Public Service, 21 Wn.2d 201, 150 P.2d 709 (1944), on the point that the question of jurisdiction of an administrative agency is a judicial matter.

[74] Floe v. Cedergreen Frozen Pack Corp. 37 Wn.2d 886, 226 P.2d 871 (1951).

[75] The fact that provision is made for review by the courts will not always sustain the delegation of judicial power. A statute providing that the state board of law examiners could hear and order the disbarment of an attorney constituted an unconstitutional delegation of judicial power. The power to disbar is an inherent judicial function, exercisable only by the courts. In re Bruen, 102 Wash. 472, 172 Pac. 1152 (1918). Compare State Board of Medical Examiners v. Macy, 92 Wash. 614, 159 Pac. 801 (1916) (state medical board granted power to revoke license of doctor); State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 Pac. 544 (1905) (state dental board granted power to issue licenses to dentists); Van Dyke v. School District No. 77, 43 Wash. 235, 86 Pac. 402 (1906) (board of school directors granted power to discharge teacher).

[76] State ex rel. Chicago, M. & St. P. Ry. v. Public Service Commission, 94 Wash. 274, 162 Pac. 523 (1917).

In noting the case law in point it will be readily apparent that the principles relating to implementation by the agency of the powers delegated are most general in character. Yet an understanding of the principles involved necessitates an awareness of at least a few instances wherein they have been applied.

One begins with the principle that an administrative agency, being a creature of statute, has no inherent powers. It has only such powers as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted.[77]

The exercise of express powers, assuming no delegation problem, has seemingly created no problem. Thus, where a statute provided that the state board of health should be supreme in matters of quarantine with powers to declare, enforce, modify, relax, and abolish a quarantine, the court had no difficulty in sustaining a regulation that no child, teacher, or janitor should attend school unless vaccinated within seven years prior to the date of the commencement of school.[78]

More difficult has been the problem of implied powers. The difficulty is one primarily of statutory interpretation in each instance. That the court has been willing to imply powers not expressly granted is illustrated by a case wherein the department of transportation was authorized by statute to prevent temporary rates in a tariff filed by a ferry company from becoming effective. The court held that this necessarily implied the power to allow a tariff to become effective immediately, pursuant to reasonable conditions. As a result, a ferry company was allowed to charge according to a tariff upon condition that refunds should be made to patrons if the temporary rates were later found to be unreasonably high.[79]

Likewise, where a school board was authorized to employ teachers and to adopt such rules as might be deemed essential to the well-being of the schools, it was held that a regulation was valid which provided that no teacher should be employed who was a member of a designated teachers' association and that all applicants should sign a declaration that they were not members thereof.[80]

In numerous cases, on the other hand, the court, while recognizing

[77] State ex rel. Public Utility District No. 1 v. Department of Public Service, 21 Wn.2d 201, 150 P.2d 709 (1944).

[78] State ex rel. Lehman v. Partlow, 119 Wash. 316, 205 Pac. 420 (1922).

[79] State ex rel. Puget Sound Navigation Co. v. Department of Transportation, 33 Wn.2d 448, 206 P.2d 456 (1949).

[80] Seattle High School Chapter No. 200, American Federation of Teachers v. Sharples, 159 Wash. 424, 293 Pac. 994 (1930).

the doctrine of implied powers, has refused to find any implication for the particular regulation or order of the agency. A statute provided for the supervision and regulation by the department of public service of auto transportation companies operating between fixed termini or over regular routes. Further, the commission was empowered "to supervise and regulate auto transportation companies in all other matters affecting the relationship between such auto transportation companies and the traveling and shipping public." It was held that this did not authorize the department to regulate charter services of such companies.[81]

The board of pilotage commissioners was authorized to make rules establishing the qualifications of pilots on Puget Sound, to give examinations and to issue licenses, and do such other things as were reasonable, necessary, and expedient to insure proper and safe pilotage. This did not empower the board to limit the number of licenses to be issued.[82]

Though a comparison of the four above-mentioned cases is of little aid in formulating a general rule to guide the practitioner, they do illustrate very well the hazards of predicting the success of a contention that a power, though not expressly granted, is implied. Probably the best one can do is to say that the administrative regulation or order must have some reasonable relation to the statute or ordinance. From that point on, the problem is the standard one of convincing the court that the facts in the immediate situation are most like those in the cases supporting one's position.

All of the cases involving implementation of judicial and legislative powers by administrative agencies appear to rest basically upon the application of the express powers or implied powers doctrine. The court has, however, sometimes phrased this basic idea in different language.

It has been said that an administrative agency may not by means of an interpretative regulation or ruling actually modify or amend the statute under which the agency functions. This doctrine has perhaps been most often called into play in situations wherein the state tax commission has attempted by regulation to impose a tax upon something not specifically covered by statute. Under a statute imposing a business tax, to be measured by the value of the gross proceeds derived

[81] North Bend Stage Lines, Inc. v. Schaaf, 199 Wash. 621, 92 P.2d 702 (1939).

[82] State ex rel. Sater v. Board of Pilotage Commissioners, 198 Wash. 695, 90 P.2d 236 (1938). Other cases where the court refused to imply the powers contended for are Wishkah Boom Co. v. Greenwood, 88 Wash. 568, 153 Pac. 367 (1915), and Northern Pacific Ry. Co. v. Denney, 155 Wash. 544, 285 Pac. 452 (1930).

from the sale of products manufactured, the tax commission issued a regulation declaring that subsidies paid to a flour mill by the government were part of the gross proceeds of the business. This, the court held, was an attempted amendment of the statute which the commission had no power to enact.[83] Neither could the tax commission construe the word "use" in a statute to mean "storing" or "withdrawing from storage,"[84] nor could it impose a retail sales tax directed at the transfer of title to property upon the service rendered by a printing firm.[85]

Perhaps the most striking illustration of an attempt by an administrative agency to extend and modify a statute is *State v. Mills*.[86] The state game commission was authorized to promulgate rules governing the taking of game. A regulation was adopted prohibiting the displaying of any game animal, bird, or fish. The regulation was held invalid as an attempt to extend the statute to cover displaying as well as taking.[87]

In some instances agencies have attempted to adopt regulations which not only amended, modified, or extended a statute, but directly conflicted therewith. Such regulations have been declared invalid with little difficulty. Where a statute provided that an "employing unit" under the unemployment compensation act consisted of eight or more individuals, a regulation stating that a unit was composed of one or more individuals was invalid.[88] An agency could not adopt a rule prohibiting the granting of a pension to a disabled fireman whose disability resulted from his immoral habits, when the statute granted the pension without any such qualification.[89] Where a statute prohibited the hunting of game in a particular county, the state game warden could not provide for such hunting.[90] And where a statute provided that an application for workmen's compensation must be filed within one year after the injury occurred or the rights of beneficiaries accrued, the

[83] Fisher Flouring Mills Co. v. State, 35 Wn.2d 482, 213 P.2d 938 (1950).
[84] Northern Pacific Ry. v. Henneford, 9 Wn.2d 18, 113 P.2d 545 (1941). Compare Stokeley-Van Camp Inc. v. State, 150 Wash. Dec. 463, 312 P.2d 816 (1957), where a tax commission regulation was upheld which defined "to manufacture" to include the preparation and freezing of fresh fruits and vegetables.
[85] Washington Printing & Binding Company v. State, 192 Wash. 448, 73 P.2d 1326 (1937).
[86] 5 Wn.2d 322, 105 P.2d 51 (1940).
[87] But see Vail v. Seaborg, 120 Wash. 126, 207 Pac. 15 (1922), where the state fisheries board was specifically empowered to promulgate regulations amending, modifying, or revoking statutes; Morgan v. Department of Social Security, 14 Wn.2d 156, 127 P.2d 686 (1942), where departmental action substituting a definition of "need" for that set forth in an initiative was upheld.
[88] Ernest v. Kootros, 196 Wash. 138, 82 P.2d 126 (1938).
[89] In re Gifford, 192 Wash. 562, 74 P.2d 475 (1937).
[90] State v. Thompson, 111 Wash. 525, 191 Pac. 620 (1920).

department of labor and industries could not allow a claim filed thereafter.[91]

Assuming that a contention is made that an administrative agency is exercising a power not expressly or impliedly granted or that it is attempting to amend, modify, or extend a statute, upon whom rests the burden of proof? It seems clear that the burden lies with the person attacking the agency action and that it is not for the agency to establish the validity of such action. In instances wherein it has been contended that an agency has exceeded its powers in promulgating a regulation or interpreting the empowering statute, the court has stated that the agency's views are entitled to "great weight."[92] Likewise, when the agency is acting in a quasi-judicial capacity, as when an agency ordered the transfer of territory from one school district to another, the burden of proving an abuse of discretion is with the person asserting it.[93]

CONCLUSION

The delegation problem is still a very live issue in this state. In solving the problem the initial inquiry is whether the legislature has prescribed any standards to guide the agency. If not, the likelihood that the delegation is invalid is great. If there are standards, though general in nature, the inquiry becomes one of examining such factors as the necessity of administrative action and practicality of action by others, the character of the business or activity regulated, the right-privilege concept, the police power, the procedural safeguards, and the character of the agency or person exercising the power. If the delegation can be sustained, the question is whether the agency has properly implemented the power granted. This requires a consideration and application of the doctrine that an agency has no inherent power, but only such power as is expressly given or necessarily implied. Another way of stating this is that the agency may not amend, modify or extend the statute under which it functions.

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[91] Wheaton v. Department of Labor & Industries, 40 Wn.2d 56, 240 P.2d 567 (1952).

[92] Fisher Flouring Mills Co. v. State, 35 Wn.2d 482, 213 P.2d 938 (1950); Wendt v. Industrial Insurance Commission, 80 Wash. 111, 141 Pac. 311 (1914).

[93] Malaga School District No. 115 v. Kinkade, 47 Wn.2d 516, 288 P.2d 467 (1955). In some instances the matter is made clear by the empowering statute. The workmen's compensation act states that the decision of the agency shall be prima facie correct and the burden of proof shall be upon the party attacking the same. RCW 51.52.115. For interpretation of this statute see Olympia Brewing Co. v. Department of Labor & Industries, 34 Wn.2d 498, 208 P.2d 1181 (1949).