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Administrative Law--Selective Service--Reclassification of Registrant Without New Evidence Held Denial of Due Process (Manke v. United States, 259 F.2d 518 (4th Cir. 1958))

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RECENT DECISIONS

ADMINISTRATIVE LAW—SELECTIVE SERVICE—RECLASSIFICATION OF REGISTRANT WITHOUT NEW EVIDENCE HELD DENIAL OF DUE PROCESS.—Registrant had been given a classification of "conscientious objector" on eight different occasions, even though the board knew he had participated in a college reserve officers' training program. Acting on a Department of Justice report stating that registrant's conscientious objection was not in good faith and recommending reclassification, the board revoked his deferment. In a criminal prosecution for refusing to submit to induction, the Court *held* that, in the absence of new evidence, there was a lack of fairness amounting to a denial of due process in the board's consideration of the recommendation. *Manke v. United States,* 259 F.2d 518 (4th Cir. 1958).

The Universal Military Training and Service Act provides that decisions of the local boards are final.[1] The object of Congress in providing for this administrative finality is the assurance to the conscription process of the speed which the urgency of the situation may demand.[2] Therefore it is not surprising that the strictness with which the courts have interpreted the provision appears to have varied with the degree of danger confronting the nation at the time.[3]

The courts early recognized a right of review by writ of habeas corpus after induction upon proof that the investigation had not been fair or where the finding of the board was contrary to all substantial evidence.[4] However, the question of whether to allow a registrant to challenge the decision of the board as a defense in a criminal action for refusal to submit to induction was more difficult to resolve..

In the leading case of *Estep v. United States,*[5] the United States Supreme Court held that it was not necessary to submit to induction to be deemed to have exhausted all administrative remedies,[6] and having exhausted the procedures prescribed by the Universal Military Training and Service Act, improper classification is a good defense where the local boards lacked jurisdiction.[7] But the question of

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[1] 62 Stat. 620 (1948), as amended, 50 U.S.C. APP. § 460(b)(3) (1952).

[2] See Falbo v. United States, 320 U.S. 549, 554 (1944).

[3] See DAVIS, ADMINISTRATIVE LAW § 238, at 835-36 (1951).

[4] Arbitman v. Woodside, 258 Fed. 441 (4th Cir. 1919); United States v. Powell, 38 F. Supp. 183 (D.N.J. 1941). The propriety of this method of review was assumed in Eagles v. Samuels, 329 U.S. 304 (1946).

[5] 327 U.S. 114 (1946).

[6] "Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them." Estep v. United States, 327 U.S. 114, 123 (1946).

[7] Estep v. United States, *supra* note 6.

jurisdiction, it was held, is reached only where there is no basis in fact [8] for the board's decision.

Simultaneously, the courts began to introduce the constitutional due process doctrine to support reversals of draft board decisions. Thus it was held that a registrant is entitled to a copy of the recommendation made by the Department of Justice [9] and to a fair résumé of the facts on which the recommendation was based,[10] so that he may defend himself.

A third group of decisions seems to rest on a combination of the theories of "denial of due process" and "no basis in fact." [11] In *United States v. Everngam* [12] the court held that where the hearing officer had based his recommendation on his own interpretation of the tenets of the registrant's religion, he had used an improper test which amounted to a denial of due process.[13] In *United States v. Cain*,[14] it was held that, while it is proper for a board to seek advice on a question incidental to a registrant's classification, it is a denial of due process for a board to abdicate its function by permitting a panel of experts to decide the sincerity of the registrant's claim.[15]

The principal case, *Manke v. United States*,[16] is probably most accurately classified as belonging to this third category of cases. It is distinguishable from this group, however, in that here the court expressly stated that there was a basis in fact for refusing the classification, since the registrant had participated in a reserve officers' training program.[17] But there is a similarity in that, while there would have been a basis in fact had the board initially refused the deferment, it might be said that there was no basis for retracting the deferment once it had been decided that the facts warranted the classification. An analogy might be drawn to the *Cain* case.[18] In *Cain* a panel was allowed to make a decision which the board itself should have made; here, the Department of Justice, whose func-

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[8] *Id.* at 122-23.

[9] Gonzales v. United States, 348 U.S. 407 (1955).

[10] United States v. Nugent, 346 U.S. 1 (1953). "A fair résumé is one which will permit the registrant to defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force." Simmons v. United States, 348 U.S. 397, 405 (1955).

[11] In these cases the courts held that the boards had denied the defendants due process by relying on improper grounds for their decisions, but intimated that, had the Government been able to offer some other bases for the classifications, their decisions would have been final.

[12] 102 F. Supp. 128 (S.D.W. Va. 1951).

[13] United States v. Everngam, 102 F. Supp. 128 (S.D.W. Va. 1951).

[14] 149 F.2d 338 (2d Cir. 1945).

[15] United States v. Cain, 149 F.2d 338 (2d Cir. 1945).

[16] 259 F.2d 518 (4th Cir. 1958).

[17] Manke v. United States, 259 F.2d 518, 521 (4th Cir. 1958).

[18] United States v. Cain, *supra* note 15.

tion in this process is a purely advisory one,[19] was apparently permitted to do the same thing.

The case seems to apply a new concept of finality to board decisions, making them irreversible even by the boards themselves without new evidence. While this seems a radical departure from the *laissez faire* attitude with which the courts have viewed the conscription process in the past,[20] the burden placed on the boards does not seem an unreasonable one. It is a basic principle that a deferment is to be granted only when, under the unusual circumstances present, the registrant clearly establishes his right to it.[21] If it is conceded that there are such circumstances present, it seems only reasonable that the same facts cannot support a reversal by which the board denies the deferment.

There is, however, the danger that the boards would react to such an imposition of finality by arbitrarily refusing to grant a deferment in the first instance, thus securing for themselves the advantage of the Department of Justice's recommendation before making a final decision.[22] In that event, the effect would be precisely what the courts have tried to avoid—an abdication by the board of its function, permitting the Department of Justice alone to all but classify the registrants.

ANTITRUST — RELEVANT MARKET OF CHAMPIONSHIP BOUTS DOES NOT INCLUDE ALL PROFESSIONAL BOXING CONTESTS.—Defendants were engaged in the promotion of professional boxing matches in the United States. The Government in bringing this action alleged violation of sections 1 and 2 of the Sherman Act[1] in that

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[19] Exec. Order No. 10363, 17 Fed. Reg. 5456 (1952).

[20] For a review of the limitations placed on judicial review of draft board decisions, see concurring opinion of Justice Frankfurter, Estep v. United States, 327 U.S. 114, 134 (1946).

[21] "It must be observed . . . that we are dealing with an exemption, and that under familiar rules of statutory construction, the appellant must bring himself clearly within the exempted class." Rase v. United States, 129 F.2d 204, 207 (1942).

[22] The Department of Justice inquiry is made only when a registrant appeals from a denial of the conscientious objector classification. Thus, where a board desires a more thorough exposition of the facts before making a final decision, the simple expedient would be to refuse the classification and allow the registrant to appeal.

[1] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1952).

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any