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RECENT DECISIONS

ADMINISTRATIVE LAW — CIVIL RIGHTS — SINGLE COMMISSIONER'S DETERMINATION HELD NON-REVIEWABLE UNDER SECTION 298 OF NEW YORK EXECUTIVE LAW.—Petitioner, a negro, filed a complaint under Section 297 of the New York Executive Law with the State Commission Against Discrimination, alleging denial of employment due to racial discrimination. A commissioner investigated the matter and dismissed the petition for want of probable cause. Petitioner's appeal to the chairman of the Commission for reconsideration was denied. Petitioner then appealed to the New York Supreme Court pursuant to Section 298, New York Executive Law; the commissioner's determination was affirmed on the merits. The Appellate Division, affirming without reaching the merits of the petition, *held* that Section 298 provides only for review of such orders as issue after full hearings before three commissioners sitting as the Commission. *Jeanpierre v. Arbury,* 3 A.D.2d 514, 162 N.Y.S.2d 506 (1st Dep't 1957).

The Commission was created by the State Law Against Discrimination [1] under the state's police power,[2] ". . . to effectuate its declared policy of combating the practise of discrimination on the basis of race, creed, color or national origin, as a threat to our democratic institutions." [3]

Such discrimination as constitutes an unlawful employment practice is defined in Article 15 of the Executive Law.[4] The statute establishes procedure whereby any person claiming to be aggrieved by an unlawful practice may file a complaint with the Commission.[5] The Commission then designates a single commissioner to investigate, and if, after investigation, he determines ". . . that probable cause exists for crediting the allegations of the complaint . . ." he will attempt conciliation and persuasion. Otherwise, if in his judgment circumstances so warrant, he may serve notice of a formal hearing to be conducted before three commissioners, during which testimony shall be taken under oath and transcribed. Following this, the Commission is required to state its findings of fact and to issue an order to

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[1] N.Y. EXECUTIVE LAW, art. 15.

[2] Jeanpierre v. Arbury, 3 A.D.2d 514, 523, 162 N.Y.S.2d 506, 515 (1st Dep't 1957) (dissenting opinion).

[3] Holland v. Edwards, 307 N.Y. 38, 43, 119 N.E.2d 581, 583 (1954).

[4] N.Y. EXECUTIVE LAW § 296.

[5] *Id.* § 297.

cease and desist, or an order dismissing the complaint.[6] These orders, issued after full hearings before three commissioners sitting as the Commission, are the *only* orders mentioned in Section 297.

Section 298 makes provision for judicial review of ". . . such order of the commission . . ."[7] upon the written transcript of the record of the hearing. In reviewing, the court has power ". . . to make and enter upon the pleadings, testimony, and proceedings set forth in transcript, an order enforcing, modifying, enforcing as so modified, or setting aside in whole or in part the order of the commission."[8] No *express* provision is made for judicial review of any *intermediate* decisions or determinations by any single commissioner, as in the instant case. Accordingly, the Court in the instant case reasoned that the express grant of the right of review for certain orders bars similar review where the right has not been explicitly granted, citing *Guardian Life Ins. Co. v. Bohlinger.*[9]

However, the *Guardian Life* case, which is concerned with the Insurance Law, is distinguishable from the instant case. At that time, the Insurance Law specified the actions of the Superintendent that were subject to judicial review, stating which action was appealable and which was not.[10] Within that framework the court could reasonably infer that it was the legislative design that the Superintendent's actions be reviewable only where the statute expressly so provided. But, in the instant case, the general judicial review section of the Executive Law seems an inadequate basis for determining that the legislative intent was to specify some orders as appealable and others as non-appealable.

Section 297 is unique in that it provides for an intermediary investigation by one man as a preliminary to forwarding the matter for a full hearing by the full Commission. This is unlike the statutes governing the procedures of other administrative agencies[11] where provision is made directly for a hearing or investigation by a full board, panel, commission, or officer acting as the board.

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[6] *Ibid.*

[7] *Id.* § 298.

[8] *Ibid.*

[9] 308 N.Y. 174, 124 N.E.2d 110 (1954). Then too, a possible argument that might have been employed is that the court cannot exercise jurisdiction unless properly petitioned, and Section 298 requires filing of a written transcript of the record of the hearing before the Commission, when so petitioning. Since such transcript is non-existent save as following a full hearing, it could be argued that the only orders subject to judicial review are those issued after a full hearing as mentioned in Section 297.

[10] See, *e.g.*, N.Y. INS. LAW §§ 34, 40(7), 51(5), 117(2). Section 34 was amended subsequent to this case to the effect that ". . . notwithstanding the specific enumerations of the right to judicial review in this chapter, any order, regulation or decision of the superintendent is declared to be subject to judicial review as permitted in a proceeding under article seventy-eight of the civil practise act." Laws of N.Y. 1956, c. 932.

[11] See, *e.g.*, N.Y. EDUC. LAW § 6515(4); N.Y. LAB. LAW § 706(2); N.Y. WORKMEN'S COMP. LAW § 20.

Cases in this latter area present no problem as to reviewability of the final orders of the full boards or commissions, such orders being subject to review in Article 78 proceedings.[12] However, a definite problem exists where an intermediary is given power to either dismiss petitions, or forward them for full hearings. A question naturally arises as to the finality (for purposes of Section 298) of such a dismissal order by this intermediary, insofar as *final* orders have been deemed the only ones subject to judicial review.

The decision in the instant case must turn on whether the dismissal of the petition as affirmed by the commission chairman was a final determination[13] by the Commission for the purposes of Section 298. Petitioner filed his verified complaint pursuant to Section 297 with the *Commission* and not with an individual commissioner. Thus it would seem any determination given him is in effect a determination of the Commission, despite the fact that an individual commissioner personally dismissed the complaint by letter. Petitioner pursued all the remedies available to him under the internal procedures adopted by the Commission.[14] As far as the agency was concerned, it terminated the matter. Nevertheless, it has been held, that absent express legislative prohibition, there is inherent power in the courts to review the exercise of discretion or the abuse thereof by an administrative agency performing a quasi-judicial function.[15] Under the strict construction of the Court, it would seem that the action of a single commissioner, regardless of how arbitrarily rendered, would not be subject to appeal, since it would not be a final order.

ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATION — RECORDED CONVERSATION HELD NOT PRIVILEGED. — An action was brought to restrain a New York Legislative Committee from divulging publicly the contents of a secretly recorded, private conversation between an attorney and his client. The plaintiffs claim that under

[12] N.Y. CIV. PRAC. ACT § 1285(3) provides that review is unavailable of those determinations which do not finally determine the rights of the parties.

[13] Such dismissal as affirmed by the commission chairman is, as to the petitioner, a final determination within the spirit of Article 78 of the New York Civil Practice Act though not, as the Court ruled, within the strict construction of Section 298.

[14] Rules Governing Practise and Procedure before the State Commission Against Discrimination, 4 N.Y. CONSOLIDATED LAWS SERVICE (Supp. 1957, p. 60).

[15] See, *e.g.*, Marburg v. Cole, 286 N.Y. 202, 36 N.E.2d 113 (1941); Markowitz v. Moss, 29 N.Y.S.2d 709 (Sup. Ct. 1941).