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SEC Investigation--Disclosure (LaMorte v. Mansfield)

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In deciding as it did, the court of appeals further rejected the appellee's contention that Paragraph III of the injunction was necessary to protect the court's jurisdiction over the action before it. The appellees had cited a federal statute[15] which permits the federal courts to issue writs to aid their jurisdiction. The court here felt that any action taken by the FAA against any of the defendants would have no detrimental effect on the court's jurisdiction.[16]

While procedural safeguards are becoming a very significant area in administrative law,[17] the circuit court particularly avoided the entire question. It was concerned basically with the interpretation of the federal statute prohibiting illegal work stoppages and with the judicial interference in administrative activities. For this reason, the case is in line with precedents in the area and merely underlines the Second Circuit's tendency to exercise judicial restraint in interfering with administrative disciplinary proceedings.

SEC INVESTIGATION — DISCLOSURE

When an administrative agency gathers information or documents in the course of an investigation, this information has usually been held

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plaint and two weeks later it appealed the decision. All of these events had not transpired at the time the district court granted the conditional injunction in *PATCO*.

[15] The federal statute involved here was 28 U.S.C. § 1651(a) (1964), which states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Various courts have used this rationale in similar situations to affirm district courts' conditional injunctions. *See, e.g.*, United States v. Moore, 427 F.2d 1024 (10th Cir. 1970) (Breitenstein, J., dissenting) which dealt with a protective order issued by the courts with its injunctive relief, restraining FAA disciplinary action against air traffic controllers, pending disposition of issues of civil actions seeking permanent injunctions. The Tenth Circuit held that the order was authorized for purposes of maintaining the district court's jurisdiction over the parties.

The Second Circuit did not accept the same rationale. It agreed with the dissent in *Moore* which argued:

> The majority hold that the protective order effected a permissible restoration and maintenance of the status quo and was issued in aid of the district court's jurisdiction as authorized by 28 U.S.C. § 1651. These reasons, considered either separately or collectively, do not warrant the judicial encroachment on executive powers which results from the protective order.

Id. at 1025.

In *PATCO* the court quoted from the Supreme Court which stated in DeBeers Consol. Mines Ltd. v. United States, 325 U.S. 212, 220 (1945),

> Section 1651 cannot be used to allow a court to deal "with a matter lying wholly outside the issues in the suit."

438 F.2d at 81-82.

[16] *See* 6 J. MOORE, FEDERAL PRACTICE ¶ 54.10[5] at 106 (2d ed. 1966) which stated that the court would retain subject matter and personal jurisdiction over the defendants.

[17] The case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), outlined the various procedural safeguards required in an evidentiary proceeding prior to the termination of welfare benefits. Its impact was undoubtedly felt in the district court's decision in *PATCO*.

to be confidential. *LaMorte v. Mansfield*,[18] on the other hand, has severely narrowed this privilege of confidentiality afforded the agency in its maintenance of investigatory proceedings. The petitioner in this case was a defendant in a stockholders action[19] who had given testimony at a nonpublic investigation conducted by the Securities and Exchange Commission (SEC).[20] LaMorte petitioned for a writ of mandamus to require the court to vacate an order directing him to relinquish the transcripts to the plaintiffs. The court held that since the petitioner had requested a transcript of the earlier investigation and since the SEC had placed no restrictions on disclosure of its contents, the transcript was not protected by any privilege of nondisclosure and he would be required to make the transcript available to the plaintiffs and co-defendants.[21]

LaMorte based its ruling on its construction of various federal statutes. Traditionally, non-public investigation records have been held to be confidential as prescribed by federal statute, amended in 1961.[22] However, under another federal statute, the transcript of testimony given in such a non-public investigation[23] must be released by the agency to the witness upon request.[24] The instant case has added its

18 438 F.2d 448 (2d Cir. 1971).

19 Zeints v. LaMorte, 319 F. Supp. 956 (S.D.N.Y. 1970), was an action brought by Zeints and other stockholders against LaMorte, a corporate officer, for alleged violation of the federal securities laws. The district court ruled that LaMorte must furnish the plaintiffs with a copy of the transcript of the SEC investigation.

20 Petitioner had secured copies of the transcript pursuant to SEC Reg. B, 17 C.F.R. § 203.6 (1970). In refusing to furnish the plaintiffs with the transcript, petitioner LaMorte stated that the interrogation by the SEC had been a confidential communication and therefore he was privileged not to disclose it. 438 F.2d at 449.

21 The court was spurred to write an opinion in this case by the realization that the problem was a recurring one. In White v. Jaegerman, 51 F.R.D. 161 (S.D.N.Y. 1970), the district court had held that the transcripts of an earlier SEC investigation could be subject to discovery and thus should be admitted over the objection of the former witness. While *White* is not a clear precedent for the *LaMorte* decision, it seemed to foreshadow a broader usage of the heretofore confidential transcripts.

22 SEC Reg., 17 C.F.R. § 240.0-4 (1961) states:

> Information or documents obtained by officers or employees of the Commission of any examination or investigation pursuant to section 17 (a) . . . (15 U.S.C. 78q(a)) or 21(a) . . . (15 U.S.C. 78u(a)) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other nonpublic records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. . . .

23 Under SEC Reg. A, 17 C.F.R. § 203.2 (1964),

> information or documents obtained by the Commission in the course of any investigation or examination, unless made a matter of public record shall be deemed non-public.

24 SEC Reg. B, 17 C.F.R. § 203.6 (1970) provides:

> A person who has submitted documentary evidence or testimony in a formal investigative proceeding shall be entitled to procure a copy of his documentary evidence or a transcript of his testimony on payment of the appropriate fees. In

own interpretation of the statute by saying that once the transcript has been released to the witness, it is no longer considered confidential. As the court stated, "[t]o the extent that a privilege exists, it is the agency's, not the witness'."[25]

The *LaMorte* decision undoubtedly will have an impact on the agency privilege of secrecy so explicitly guarded in the past by federal statute. The eventual piercing of the agency's veil of secrecy was a two-step process. First, by statute, the SEC was required to furnish a witness in a non-public investigation with a copy of his own transcript.[26] Second, in the present case, the court held that once this release had been made without an SEC restriction on witness disclosure, the protective cloak disappeared, so that he has no privilege of secrecy when asked to disclose its contents.[27]

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any event, any witness (or his counsel), upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

Until 1970, the statute contained a discretionary caveat which stated:

Provided, however, That in a nonpublic formal investigative proceeding a person seeking a transcript of his testimony shall file a written request stating the reason he desires to procure such transcript, and the Commission may for good cause deny such request.

The statute has been amended to give the witness an absolute right to a transcript of his testimony.

[25] The court elaborated upon this idea:

The agency is free to withdraw the veil of secrecy, and once the witness has been allowed to obtain the transcript of his testimony, it is no more privileged or confidential in his hands — absent any restriction placed by the agency on disclosure of its contents — than any other record of a previous statement would be.

438 F.2d at 451.

To bolster its decision, the court noted that the Information Act, 5 U.S.C. § 552 (1966), by amending section 3 of the Administrative Procedure Act, has significantly increased the public availability of agency records. The court inferred that the legislative intent was to make access to agency records easier and thus decided here that it would be in the public interest to hold that this transcript was now a public document.

[26] Prior to the amended portion of SEC Reg. B, 17 C.F.R. § 203.6 (1970), the SEC could refuse to release such a transcript. In Commercial Capital Corp. v. SEC, 360 F.2d 856 (7th Cir. 1966), a case involving individuals who had been named as defendants in an injunction suit brought by the SEC, in which they requested that the SEC permit them to purchase transcripts of their testimony at an SEC hearing, the court upheld the SEC's denial of such a request and held that the decision whether or not to release transcripts of non-public investigations was in the agency's discretion. *Commercial Capital* arose under § 6(b) of the Administrative Procedure Act prior to the Information Act of 1966 and prior to the amendment to SEC Reg. B, 17 C.F.R. § 203.6 (1970), which made transcript release to a witness mandatory.

[27] The court rejected the contention that it was Congress' intent to increase the confidentiality of agency data. In St. Regis Paper Co. v. United States, 368 U.S. 208 (1961),

the Supreme Court had held that the confidentiality provisions of the Census Act did not prevent other branches of the government from compelling a respondent to produce copies of [census] reports that it had given the Bureau. . . . . [However,] the *St. Regis* case was . . . overruled [by Congressional action] in 1962 [by enactment of 13 U.S.C. § 59(a)(3) (1964)], and retained copies of census reports are now immune from subpoena.

Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1183-84 (1969).

The Second Circuit felt that this Congressional action had little effect on the *LaMorte*

The impact of such a decision is great. The very purpose of labeling an investigation non-public is undercut.[28] If the agency must release transcripts to witnesses and witnesses have no privilege of secrecy once the transcript is in their hands, then the agency's privilege of confidentiality will, in effect, be greatly decreased. The court has thus interpreted the federal statute on transcript disclosure to effectuate a significant piercing of the agency's veil of secrecy.

ANTIBIOTICS CERTIFICATION — EVIDENTIARY HEARING

The right of an aggrieved party to an evidentiary hearing of an administrative action is not an absolute one.[29] It has often been held that where a hearing is not a matter of right by statute,[30] the party must establish some valid basis for its request.[31] The Second Circuit Court of

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situation because the effectiveness of the Census Bureau was dependent upon a guarantee of confidentiality, whereas in the SEC investigation a person is under a subpoena to testify and thus is testifying not as a result of a promise of confidentiality but on penalty of contempt.

[28] Nonpublic investigations have traditionally retained their aura of inaccessibility due to the realization that they

> might be thwarted in certain cases if not kept secret, and that if witnesses were given a copy of their transcript, suspected violators would be in a better position to tailor their own testimony to that of the previous testimony, and to threaten witnesses about to testify with economic or other reprisals.

438 F.2d at 451, *quoting* Commercial Capital Corp. v. SEC, 360 F.2d 856, 858 (7th Cir. 1966).

[29] The courts have differed on the question of whether an individual affected by administrative action is entitled to a hearing. Some courts have warned against agency action without an evidentiary hearing. *See, e.g.*, Pennsylvania Gas & Water Co. v. Federal Power Comm'n, 427 F.2d 568 (D.C. Cir. 1970), where the court stated that an agency should exercise restraint against the temptation to take action without notice and a hearing. In the same vein, courts have discussed the question of a hearing by stating, "[T]he need for administrative flexibility does not of itself preclude an agency hearing or judicial review." Hahn v. Gottlieb, 430 F.2d 1243, 1246 (1st Cir. 1970). Other courts, however, have reiterated the traditional maxim that "[A] hearing is not constitutionally compelled in all cases where individual rights may be impaired." *See* Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970).

[30] A hearing before an agency is a right when required by statute or when the agency's action may deprive an individual of due process. Where there is no mandatory statutory requirement of a hearing, the courts will evaluate such factors as: the nature of the interest effected, the availability of judicial review, and the immediacy of the case. *See* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). *See* Note, *Summary Removal of Drugs from the Market: The Specter of the Heavy Bureaucratic Hand*, 24 SW. L.J. 880, 881 n.11 (1970).

[31] In discussing the question of an evidentiary hearing, the courts generally make a distinction between whether the agency's action had involved adjudication or rule-making. As a general rule, the agencies are not permitted to act adjudicatively without a hearing, whereas in rule-making, a hearing is not required. Adjudicative facts are those which concern the parties involved, *i.e.*, they answer the question of "who did what, where, when, how, why and with what motive or intent." Rule-making (or legislative) facts do no concern the immediate parties, but are general facts which are used to assist in establishing policy and discretion. These distinctions, however, are often unsatisfactory in various respects, as shall be seen in the instant case. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 412-13 (1958).