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Administrative Law--Army Discharges--"Final" Determination by Secretary of Army Held Reviewable by Courts (Harmon v. Brucker, 355 U.S. 579 (1958))

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RECENT DECISIONS

ADMINISTRATIVE LAW—ARMY DISCHARGES—"FINAL" DETERMINATION BY SECRETARY OF ARMY HELD REVIEWABLE BY COURTS.—Petitioner received a less-than-honorable discharge before his term of Army service expired.[1] The reason given was national security, although his efficiency and character ratings were either "excellent" or "unknown."[2] After exhausting his administrative remedies he petitioned the district court for relief, contending that the Secretary of the Army acted in excess of his statutory powers in basing the discharge on petitioner's pre-induction activities. The statute made the Secretary's determination final. The court denied relief, asserting lack of jurisdiction. The circuit court affirmed. On certiorari, the Supreme Court of the United States reversed, *holding* that it was within the jurisdiction of the federal courts to construe the statute to determine whether respondent had exceeded his authority, and that in this case the Secretary's action was beyond his statutory power. *Harmon v. Brucker,* 355 U.S. 579 (1958).

The Constitution of the United States grants to Congress the power "to make Rules for the Government and Regulation" of the armed forces.[3] Congress has provided that on separation from the Army, a soldier be given a certificate of discharge in the manner prescribed by the Secretary of the Army.[4] The Secretary is authorized to institute boards of review whose decisions as to the proper type of discharge in each case shall be final, subject only to his review.[5] It is around the meaning of "final" that controversy has centered.

In some congressional enactments, the court has interpreted "final" to mean the absence of further review,[6] while in others the

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[1] Harmon was first issued an "undesirable" discharge. While his case was pending before the court of appeals the character of his discharge was changed to "general under honorable conditions." Harmon v. Brucker, 243 F.2d 613 (D.C. Cir. 1957).

[2] The alleged derogatory information on which the discharge was based included activities in a camp reported to be communist-operated, employment in an organization reported to be subversive, and registration in the American Labor Party, cited by the House Committee as being under communist control. While in the Army, Harmon solicited funds to assist in the defense of two individuals who had been indicted under the Smith Act. *Id.* at 616.

[3] U.S. CONST. art. I, § 8, cl. 14.

[4] 10 U.S.C. § 652a (Supp. IV, 1952), now codified as 10 U.S.C. § 3811 (Supp. V, 1958).

[5] 58 STAT. 286 (1944), as amended, 38 U.S.C. § 693h (Supp. V, 1958).

[6] See, *e.g.,* First Moon v. White Tail, 270 U.S. 243 (1926), where the statute provided that the determination of the Secretary of the Interior should

interpretation given did not preclude judicial review.[7] The lower federal courts in passing on the meaning of "final" in the statute in question have generally asserted that decisions of the Army were not susceptible to civil review, either judicial or administrative.[8] In *Gentila v. Pace*[9] the court based its denial of relief on the finality provision of the statute, asserting that "the Board's full and 'final' review should not be subjected to a further review, or series of reviews, in the courts."[10] In *Orloff v. Willoughby*[11] it was declared that the Army was a "specialized community" within our society, not to be interfered with by the courts. *Nordmann v. Woodring*[12] considered the problems attendant upon the allowance of review, intimating the heavy burden it would impose on the court structure.

However, the Supreme Court had never decided the precise question of the availability and scope of judicial intervention in such cases. In *Patterson v. Lamb*[13] the court of appeals asserted that the courts had jurisdiction to review the action and held that the petitioner was entitled to an honorable discharge. In reversing on the merits, the Supreme Court expressly reserved judgment on "whether and to what extent the courts have power to review . . . the type of discharge certificates issued to soldiers . . . ."[14]

With the grant of certiorari in *Harmon v. Brucker*,[15] the question reserved in *Patterson* came squarely before the Court. Citing only the *Patterson* case, the Court assumed the power to review.

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be "final and conclusive" of an Indian allotment, the Supreme Court held that the statute had deprived the lower court of jurisdiction to review. Similarly, in Auffmordt v. Hedden, 137 U.S. 310 (1890), a statute provided that appraisals of imported goods should be final and conclusive. The court held the appraisal final, in the absence of fraud, and upheld the constitutionality of making an administrative determination final.

[7] Estep v. United States, 327 U.S. 114 (1946). Despite the finality provision of a statute, the Court held that it might review decisions of draft boards regarding the classification of inductees. The scope of review was limited, however, to instances when there was no basis of fact for the classification. See also Order of Railway Conductors v. Swan, 329 U.S. 520 (1947); DAVIS, ADMINISTRATIVE LAW 832 (1951). "Under the Supreme Court decisions, statutory provisions making action 'final' sometimes mean that the action is judicially reviewable to whatever extent the courts see fit to review." *Ibid.*

[8] See, *e.g.*, Shustack v. Herren, 234 F.2d 134 (2d Cir. 1956), wherein the court held that the Army has the power to discharge without a hearing and without a reason, and that the courts cannot properly interfere with that power; Davis v. Woodring, 111 F.2d 523 (D.C. Cir. 1940), which held that the court could not require the War Department to issue discharges contrary to its established rules. See also Nordmann v. Woodring, 28 F. Supp. 573 (W.D. Okla. 1939); Reid v. United States, 161 Fed. 469 (S.D.N.Y. 1908).

[9] 193 F.2d 924 (D.C. Cir. 1951).

[10] *Id.* at 927.

[11] 345 U.S. 83, 94 (1953).

[12] 28 F. Supp. 573 (W.D. Okla. 1939).

[13] 154 F.2d 319 (D.C. Cir. 1946).

[14] Patterson v. Lamb, 329 U.S. 539, 542 (1947).

[15] 355 U.S. 579 (1958).

Then, reaching the merits of the case, it pointed out that the statute [16] providing for the Review Boards expressly requires that their findings shall be based on all available records of the Army relating to the person requesting such review. The Court held that the word " 'records,' as used in the statute, means *records of military service* and . . . the type discharge to be issued is to be determined solely by the soldier's military record in the Army." [17] Since the Secretary, who has the statutory power to issue all discharges, had considered petitioner's pre-induction activities in granting him a less-than-honorable discharge, he exceeded this statutory power. The Court concluded that in circumstances where the Secretary of the Army has exceeded his statutory powers, the courts, as a matter of law, have the right to review his action and are not precluded by any finality provision in the statute under which the Secretary acted.

The importance of the *Brucker* case lies in the fact that judicial review was granted. The Supreme Court had several obstacles to overcome in deciding the issue. There were the many lower court rulings [18] and the fact that Congress, cognizant of these rulings, never passed remedial legislation. This would seem an indication that Congress agreed with the decisions.[19] Nevertheless, judicial review was extended. However, the very theory on which it was granted indicates that its scope is limited to a determination of whether the Secretary acted in excess of his statutory powers. The Court did not review an action within the discretionary powers of the Secretary. Nor did it review findings of fact.[20] The Court granted relief to an *unlawful* action of the Secretary. Not to a misjudgment, but to an exercise of power in excess of the statutory provisions.

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[16] 58 STAT. 286 (1944), as amended, 38 U.S.C. § 693h (Supp. V, 1958).

[17] Harmon v. Brucker, *supra* note 15, at 583.

[18] See, *e.g.*, Shustack v. Herren, 234 F.2d 134 (2d Cir. 1956); Davis v. Woodring, 111 F.2d 523 (D.C. Cir. 1940). See also Nordmann v. Woodring, 28 F. Supp. 573 (W.D. Okla. 1939).

[19] See United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). The court, overruling previous cases, declared that issuing a policy of insurance is a transaction of commerce within the meaning of "interstate commerce." Congress, not in agreement with this decision, enacted legislation to nullify its effect. 59 STAT. 33 (1945), 15 U.S.C. § 1011 (1946). This power is provided by the Constitution, article III, § 2: "[T]he supreme Court shall have appellate Jurisdiction as to Law and Fact with such Exceptions, and under such Regulations as the Congress shall make."

Thus we see that the silence of Congress, in the face of many judicial determinations, is an indication of its acquiescence.

[20] United States v. Williams, 278 U.S. 255 (1929). In upholding an administrative decision, the court announced that such a decision as to the facts, "is final, at least unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious." *Id.* at 257-58.

However, the dissenting opinion of Mr. Justice Clark,[21] once past the issue of jurisdiction to review, poses an interesting question of statutory interpretation. It is his contention that the act providing for judicial review based on "all available records" means all the records of an inductee's life both before and during his service in the Army; that the Court's limitation of the statute to only the soldier's military record is "lacking of justification." [22] It is submitted that Justice Clark's interpretation is more consonant with the wording of the statute and the probable intent of Congress.

ADMINISTRATIVE LAW—FORMAL HEARING AND EVALUATION OF CONDUCT UNDERLYING APPLICANT'S PREVIOUS CONVICTION HELD NECESSARY FOR REFUSAL OF BROKER'S LICENSE.—Petitioner was refused a broker's license by the Superintendent of Insurance without a formal hearing, on the ground that he was not "trustworthy" within the meaning of that requirement of the Insurance Law. The Superintendent's decision was predicated on petitioner's previous conviction for refusing to be inducted into military service after having been denied classification as a conscientious objector. Petitioner's proceeding under article 78 of the Civil Practice Act to obtain an annulment of the Superintendent's determination was dismissed by the Supreme Court, Special Term. The Appellate Division affirmed. In reversing and remitting to the Superintendent of Insurance for further action, the New York Court of Appeals *held* that petitioner was entitled to a formal hearing which might establish a judicially reviewable record. The Superintendent was instructed to go behind the previous conviction and evaluate petitioner's underlying conduct in determining whether he met the requirement of the statute. *Koster v. Holz,* 3 N.Y.2d 639, 148 N.E.2d 287, 171 N.Y.S.2d 65 (1958).

When not specified by statute, the requirement of a hearing has generally been predicated upon an individual's substantive rights being adversely affected by agency action; [1] where a mere privilege is denied or revoked no such hearing is required.[2] The requirement of a hearing has been given special emphasis in regard to the granting or refusing of a license necessary to engage in certain occupations.[3] Statutes prescribing licenses to practice as a physician,[4] to prosecute

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[21] Harmon v. Brucker, 355 U.S. 579, 583 (1958).
[22] *Id.* at 585.

[1] DAVIS, ADMINISTRATIVE LAW 246-47 (1951).
[2] *Id.* at 250.
[3] *Id.* at 251-54.
[4] Gage v. Censors of Eclectic Medical Soc'y, 63 N.H. 92 (1884).