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Constitutional Law - Review of Executive Order - Summary Dismissal of Government Employees

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authorizing suspension of a license without a hearing have been sustained against constitutional objection where they give the licensee a right to a trial de novo on appeal from such suspension.[12] The North Dakota legislature has provided the licensee with an opportunity for a hearing before the commissioner following suspension, and "upon such hearing the commissioner may either rescind his order of suspension or, good cause appearing therefor, may continue, modify, or extend the suspension of such license or revoke such license."[13] Thereafter, the licensee has the right of appeal to the courts to ". . . examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license . . ."[14] The instant case indicates that the hearing before the court takes the form of a trial de novo of the case.[15]

The problem presented by the instant case is one of "separation of powers". Authority to suspend the license was validly delegated to the Commissioner and not to the courts.[16] The provision for trial de novo in the district court is not a criminal proceeding in which case the court would have discretion in imposing sentence.[17] Thus it is arguable that the hearing on appeal should be concerned with whether the Commissioner's order has been reasonable and not an abuse of the discretion vested in him by the legislature.[18] For the court to modify the Commissioner's order as to length of suspension where substantial grounds for suspension exist and there has been no abuse of discretion is in effect to exercise his discretion for him, thereby nullifying the legislative delegation of authority.

CECIL E. REINKE.

CONSTITUTIONAL LAW — REVIEW OF EXECUTIVE ORDER — SUMMARY DISMISSAL OF GOVERNMENT EMPLOYEES. — Petitioner, an inspector for the Food and Drug Administration, was summarily dismissed from his employment under authority of Public Law 733[1] (hereinafter referred to as the "Act") as extended by Executive Order 10450, April, 1953.[2] Petitioner's appeal to the Civil Service Commission under authority of the Veteran's Preference Act[3] was declined. Petitioner then filed a complaint in the federal district court and

12. See Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408 (1939).
13. N. D. Sess. Laws 1955, c. 251, § 32.
14. N. D. Sess. Laws 1955, c. 251, § 38.
15. *Cf. In re* Wright, 228 N. C. 301, 45 S.E.2d 370 (1947). *clarified on rehearing* 228 N. C. 584, 46 S.E.2d 696 (1948); Commonwealth v. Herzog, 359 Pa. 641, 60 A.2d 37 (1948).
16. See note 11, *supra.*
17. See Prichard v. Battle, 178 Va. 403, 17 S.E.2d 393 (1941) (Suspension or revocation of drivers license is civil and not criminal in nature.)
18. See *in re* Wright, 228 N. C. 584, 46 S.E.2d 696, 700 (1948) (dictum) ("It must be noted, however, that the discretion to suspend or revoke, or not to suspend or revoke, is vested in the department, subject to a judicial review of the facts upon which its action is based. No discretionary power is conferred upon the Superior Court. Hence, if the judge, upon the hearing, finds and concludes that the license of the petitioner is in fact subject to suspension or revocation under the provisions of the statute, the order of the department entered in conformity with the facts found must be affirmed.")

1. 64 Stat. 476 (1950), 5 U. S. C. §§ 22-1, 22-3 (Supp. 1952).
2. Exec. Order No. 10405, 18 Fed. Reg. 2489 (1953) (The Order extends the Act to all government employees and supplies a negative test which is more stringent than that prescribed by the Act, i. e., the Order uses "clearly consistent with the interests of national security" as the test; the Act uses "in the best interest of national security" as the test.)
3. 58 Stat. 387, 5 U. S. C. 851-69 (1944), as amended; 66 Stat. 626, 5 U. S. C. § 851-69 (Cum. Supp. 1956).

thereafter appealed from the district court dismissal of his complaint. The circuit court affirmed. The Supreme Court of the United States reversed and *held* that the dismissal under Executive Order 10450 was improper since no determination had been made that petitioner's position affected national security as required by the Act; and that not all Federal agencies and positions held thereunder affect national security. *Cole v. Young*, 351 U. S. 536, (1956).

In general, all Civil Service employees are subject to dismissal for such causes as will promote efficiency within the service.[4] Under these procedures a reasonable doubt as to loyalty is recognized as grounds for dismissal.[5] Such employees are entitled to review by the Civil Service Commission's Loyalty Review Board.[6] However, Public Law 733 imposes a limitation on this right of review by authorizing a summary dismissal by the appropriate department head where the employee's position is affected with the national security,[7] i. e., where he occupies a "sensitive" position;[9] and, as extended by Executive Order 10450,[10] where his continued employment is not *clearly consistent* with national security.[11]

Without citing a case, the Supreme Court in the instant case has defined standards by which the provisions of the Act may be extended to include positions in agencies and departments not originally included thereunder.[12] Before the President can properly extend the provisions of the Act to other agencies or departments, these standards appear to require that there be a reasonable determination that the functions of such instrumentalities are so affected with the national security as to be sensitive.[13] Such determination requires that the subject organization have access to classified information,[14] or that their functions be "closely and immediately concerned with the defense of the nation". The Court supports its holdings by five separate arguments. First, the Act was originally applicable to only eleven named agencies which are directly concerned with national defense and which have custody over in-

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4. 62 Stat. 354, 5 U. S. C. § 652 (1948), as amended; 63 Stat. 1067 (1949), 5 U. S. C. § 652 (Supp. 1952).

5. Friedman v. Schwellenbach, 159 F.2d 22, (D. C. Cir. 1946) *Cert. denied*, 330 U. S. 838 (1947).

6. Exec. Order No. 9835, 12 Fed. Reg. 1935 (1947), Part II, Par. 3; See Kutcher v. Gray, 199 F.2d 783 (4th Cir. 1952) (dictum); See also Bailey v. Richardson, 182 F.2d 46 (D. C. Cir. 1950) (that courts will review a dismissal only to insure compliance with statutory and Constitutional provisions).

7. 64 Stat. 476 (1950), 5 U. S. C. § 22-1 (Supp. 1952) (this statute, Pub. Law 733 § 1 (1950), controls wherever in conflict with other acts).

9. Hearings, House Committee on Post Office and Civil Service, on H. R. 7439 81st Cong., 2d Sess. p. 67, 72 (a sensitive position is one in which the occupant has access to confidential, classified, or top secret material); See Garrison, *Some Observations on the Loyalty Security Program*, 23 U. Chi. L. Rev. 1, 5 (1955) (defining sensitive positions as ". . . positions where the available information would be damaging to the country if it were revealed to unauthorized persons, or positions in which the policy of the United States might be warped or molded by a person who did not have the interests of his county at heart.").

10. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

11. *Id* § 2.

12. 64 Stat. 476 (1950), 5 U. S. C. §§ 22-1, 22-3 (Supp. 1950) (The Act extended to ". . . the Department of State, Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, . . . National Advisory Committee for Aeronautics, . . ." and ". . . to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security.").

13. Cole v. Young, 351 U. S. 536 (1956) (dictum).

14. See note 9 *supra*.

formation which affects the national security.[15] Second, the language used in the Act in providing for the extension of its provisions "from time to time", indicates that a selective judgment must be exercised when extending the Act.[16] Third, in providing that a dismissed employee may seek other government employment upon affirmative determination of his eligibility by the Civil Service Commission, the Act indicates that not all agencies are sensitive.[17] Fourth, legislative history of the Act indicates that it was to apply only to sensitive agencies.[18] Fifth, the Act was designed for the protection of national security;[19] and if department heads were not required to determine that a close proximity exists between an employee's position and national security, the purpose of the Act could be perverted to allow summary and indiscriminate dismissal of government employees.[20]

The dissenting opinion contends that the decision in the instant case strikes down Executive Order 10450 and questions the Court's power to do so.[21] Mr. Justice Clark, in dissent, also argues that the Court has frustrated the clear purpose of Congress in that the Act was not meant to apply merely to sensitive agencies.[22]

It would seem that the Court could have reached its correct result more directly by resorting to Congressional committee reports which exhibit an intention to protect the nation's security from jeopardy through the acts of careless, though not disloyal, employees.[23] Employees who *do not have access to* information closely affecting national security by definition cannot divulge such material disloyally, carelessly, or at all.[24] Since the Act is not directed to the

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15. See note 12 *supra*.

16. 64 Stat. 476 (1950), 5 U. S. C. § 22-3 (Supp. 1952).

17. *Id* § 22-1.

18. S. Rep. No. 2158, 81st Cong., 2d Sess. 3279 (1950) ("The purpose of the bill is to increase the authority of the heads of Government departments engaged in sensitive activities . . ."); See also Pub. Law 729 § 3 (1942) (not codified) (a previous similar law was limited to the obviously sensitive military department).

19. 64 Stat. 476 (1950), 5 U. S. C. § 22-1 (Supp. 1952).

20. Cohen, *Administrative Law*, 44 Geo. L. J. 132, 134 (1955) (If the Act were construed to extend to nonsensitive agencies, unappealable dismissal would be authorized with no showing that continued employment might endanger national security.)

21. The majority opinion did not make a pretense of striking down the executive order, but stated rather that the order as applied by the Secretary was not in conformity with the Act; and since the President sought to act under authority of the Act, actions taken pursuant to the order will not be upheld unless in conformity with the Act. *But see* Roth v. Brownell, 215 F.2d 500, 502 (D. C. Cir. 1954) (as to the possible outcome, had the court considered the strikedown of the order. "The power of Congress to limit the President's otherwise plenary control over appointments and removals is clear.").

22. S. Rep. No. 2158, 81st Cong., 2d Sess. 3279 (1950) (In explanation of the bill, the report stated "It will be noted that this bill as amended, is not designed to set aside the President's loyalty program. It is intended that his program will be continued. Executive Order 9835 of March 21, 1947, established procedures under which employees found to be disloyal, as distinct from poor security risks, could be removed from the Federal Government. This bill is concerned primarily with the problems of dealing with those Federal employees who, although loyal, are so careless as to jeopardize the national security."); *See* letter from Dan A. Kimball, Under Secretary of the Navy to Tom Murray, Chairman of the Committee on Post Office and Civil Service, March 13, 1950, S. Rep. No. 2158, 81st Cong., 2d Sess. 3281 (1950) ("The provisions of the proposed bill would not be in conflict with the provisions of Executive Order No. 9835 of March 21, 1947 (12 Fed. Reg. 1935). That Executive Order established a Loyalty Review Board within the Civil Service Commission, which Board is the final arbiter on the dismissal of Federal employees charged with disloyalty. Executive Order No. 9835 pertains only to removal of employees who have been proved disloyal. There is no provision contained therein where a person may be removed who on the one hand is absolutely loyal but on the other hand is dangerously indiscreet.").

23. *Ibid.*

24. See Garrison, *Some Observations on the Loyalty Security Program*, 23 U. Chi. L. Rev. 1, 5 (1955); Weihaus, *Federal Loyalty-Security Program*, 1956 Wash. U. L. Rev.

possible disloyalty of federal employees, but to their probable carelessness,[25] it can reasonably be extended only to employees who have access to information, the improper disclosure of which would adversely affect national security.[26]

DUANE R. JENSEN.

DOMESTIC RELATIONS — INHERITANCE BY ADOPTED CHILDREN — RIGHT OF ADOPTED CHILD TO INHERIT FROM ITS NATURAL PARENTS. — Respondent, an adopted child claimed the right to inherit a one-fourth interest in the estate of his natural father. The administratrix of the deceased's estate contended that respondent's right to inherit from his natural parent was cut off by his adoption into another family. The Supreme Court of North Dakota, affirming the District Court, *held* that the adoption statute did not prevent an adopted child from inheriting from his natural parent. *In re Ballantine's Estate,* 81 N.W.2d 259 (N. D. 1957).

Adoption was unknown at common law therefore all provisions for inheritance by adopted children must be found in statutes and the cases construing them.[1] The North Dakota statutes as quoted in the instant case provide, "The child so adopted shall be deemed, as respects all legal consequences and incidents of the natural relation of parent and child, the child of such parent or parents by adoption, the same as if he had been born to them in lawful wedlock"[2] and "The natural parents of an adopted child shall be deprived by the decree of adoption of all legal rights respecting the child, and the child shall be free from all obligations of maintenance and obedience respecting his natural parents."[3]

The court in reaching its decision examined the history of the adoption statute.[4] The statute of 1891[5] contained the provision that an adopted child should be treated as one born to the adoptive parents in lawful wedlock ". . . except that such adoption shall not itself constitute such child the heir of such parents or parents by adoption." This quoted provision, the court observed, was omitted in the Revised Code of 1895 and said, "the omission . . . would not of itself alter . . ." the legislative intent of not disturbing the child's right to inherit from its natural parents.

The court's construction of the adoption statutes follows the decided weight of authority.[6] From a review of cases from jurisdictions with statutes similar to those in North Dakota, none were found disallowing the adopted child's right to inherit. Those barring the right base the denial upon specific statutory provision. The reason for the rule allowing the right of inheritance

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353; Emerson & Helfeld, *Loyalty Among Government Employees,* 58 Yale L. J. 1, 3-20 (1948).

25. See note 22 *supra.*

26. See note 20 *supra.*

1. See *In re* Jaren's Adoption, 223 Minn. 561, 27 N.W.2d 656 (1947); Young v. Bridges, 86 N. H. 135, 165 Atl. 272 (1933); 4 Vernier, American Family Laws 279 (1936).

2. N. D. Rev. Code § 14-1113 (1943).

3. N. D. Rev. Code § 14-1114 (1943).

4. N. D. Sess. Laws 1891, c. 4, § 6.

5. Rev. Codes of N. D. § 2804 (1895).

6. See *e. g.,* Roberts v. Roberts, 160 Minn. 740, 199 N.W. 581 (1924); Clarkson v. Hatton, 143 Mo. 47, 44 S.W. 761 (1898); *In re* Kay's Estate, 127 Mont. 172, 260 P.2d 391 (1953); *In re* Benner, 109 Utah 172, 166 P.2d 257 (1946).