ADMINISTRATIVE REVIEW: In cases which are not "contested cases" under Administrative Review Act, hearings should be granted in some instances.

April 17, 1957

Honorable C. Lawrence Leggett
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Leggett:

Under date of March 6, 1957, you submitted to this office a request for an official opinion, your request being as follows:

> "Re: Barker and Jacobs claim for fees in restitution litigation.
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> "On December 12, 1956, there was filed with me as Superintendent of Insurance an application of John T. Barker and Floyd E. Jacobs for allowance and payment of attorney's fees and expenses for representation of the Superintendent of the Division of Insurance of the State of Missouri. A copy of said application was at the same time forwarded to your office to the attention of Mr. Harry Kay.
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> "The application recites that it is filed 'to comply with the judgments, opinions, and mandates of the Supreme Court of Missouri' and 'to aver and bring to the official cognizance of said Superintendent the judgments and opinions of the Supreme Court of Missouri in' the two cases decided November 12, 1956 by the Supreme Court docket numbers 44,254 and 44,255.
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> "I hereby respectfully request your official opinion as to my jurisdiction in this matter to try and determine the application now pending before me."

The application of Messrs. Barker and Jacobs, referred to in your request, is very lengthy, and hence we will not set it out in haec verba here. The substance of the application is that in June, 1930, with the approval of the Governor and the Attorney General of Missouri, the Superintendent of the Insurance Department employed applicants to institute proceedings against a large number of stock fire insurance companies for restitution of excessive premiums collected and held by said companies in violation of lawful rates; that the terms of the written contract of employment were that if applicants and their associates were successful in recapturing all or any part of the undistributed residue of the excessive premium collections they, the applicants, were to be paid from the recaptured funds for their services and a reasonable contingent fee out of such recaptured funds; that as a result of the efforts of applicants in pursuance of said contract a fund of approximately $2,751,000.00 was recovered for the benefit of the policyholders who had paid excessive insurance premiums; that the residue of the amount recovered by applicants, to wit, $2,160,871.32, was paid to the State Treasurer in purported compliance with Section 379.395, RSMo 1949, which said amount, free and clear of all claims of policyholders, now remains in the hands of the State Treasurer; and that the reasonable value of the services of applicants is $275,000.00.

The applicants pray that you, as Superintendent of the Division of Insurance:

(a) Accept jurisdiction of and recognize their claims and preceding applications merged therein;

(b) Proceed under the Insurance Code and Chapter 536, RSMo 1949, on notice to hear and determine their application and preceding applications praying for an allowance of the claims set forth herein and to hear evidence thereon;

(c) To allow and approve the claims of applicants as expenses of the Insurance Department in a full and adequate amount as may be justified by the evidence;

(d) Determine whether the claims of applicants should be allowed as expenses of "proceedings" against insurance companies involved in the restitution proceedings and assessed against them rateably, or whether same are usual expenses of the Division of Insurance payable out of amounts appropriated by law from the Insurance Division Fund;

(e) Make an order providing for payment of the sums lawfully allowed applicants, with interest thereon, and that you make such further orders as may be lawful and just in the premises.

The question to be determined is what you shall do with respect to handling and disposing of the claims of Messrs. Barton and Jacobs.

Beginning with the case of State ex rel. v. Hall, 330 Mo. 1107, 52 SW2d 174, it has been uniformly held that the Superintendent of the Division of Insurance is the administrative officer of the state in charge of that office and courts are without authority to interfere with his actions as such officer. State ex rel. v. Dinwiddie, 343 Mo. 592, 122 SW2d 912; Jacobs et al. v. Leggett, 295 SW2d 825 (Mo.); Barker et al. v. Leggett, 295 SW2d 836 (Mo.). In the last cases just cited, the Supreme Court again quoted with approval the following from the case of State ex rel. v. Hall, supra, at 52 SW2d l.c. 177:

> " * * * The original Code and amendments thereto indicate an intention to regulate the business from beginning to end, thereby protecting individual and public interests. The enactment of this comprehensive Code made the state a real party in interest. The superintendent of insurance is the administrative officer in charge of that interest, and courts are without authority to interfere with his administration of the Code."

In view of the above-established principle, the courts have repeatedly refused to allow applicants a fee or to direct the Superintendent of Insurance to allow them a fee. Weatherby et al. v. Jackson, 358 Mo. 542, 215 SW2d 742; Jacobs et al. v. Leggett, supra; Barker et al. v. Leggett, supra.

However, by Section 22 of Article V of the Constitution of Missouri, 1945, it is provided:

> "All final decisions, findings, rules and orders of any administrative officer or body existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the

> determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record."

As pointed out above, you are an administrative officer of the state. Therefore, if the disposition of the claim of applicants involves a quasi-judicial decision or finding, then such decision or finding would be subject to direct review by the courts in the manner provided by law. So far as we can find, the courts of Missouri have not specifically defined the words "quasi-judicial." They have held certain acts to be quasi-judicial without specifically defining the words. For instance, the Supreme Court, in State ex rel. v. Thompson, 85 SW2d 594 (Mo.), was considering certain acts of the State Auditor, and in discussing the case the court said, l.c. 599:

> " * * * There is no need to repeat here what was there said and it is sufficient to say as we view the matter now before us, the function and duty to determine and designate the fund upon which he was to draw these warrants, and upon which he did draw them, were quasi judicial and were, respectively, vested in and rested upon the state auditor alone. * * *"

Other courts have defined the words "quasi-judicial" specifically. For instance, in Adamson v. Minnehaha County, 293 NW 542 (S. Dak.), the court said, l.c. 543:

> "In Hoyt v. Hughes County, 32 S.D. 117, 142 N.W. 471, this court said: 'The term "quasi judicial" is used to describe acts, not of judicial tribunals usually, but acts of public boards and municipal officials, presumed to be the product or result of investigation, consideration, and human judgment, based upon evidentiary facts of some sort, in a matter within the discretionary power of such board or officer.' The power committed to the Board of Commissioners by SDC 12.1006 requires the exercise of discretion and judgment in the light of facts revealed by investigation, and is quasi-judicial. * * *"

Likewise, in State v. Board of County Com'rs of Creek County, 107 P2d 542 (Okla.), the court said, l.c. 549:

> " * * * The distinction between the exercise of judicial and quasi judicial power is well stated in Board of County Com'rs v. Cypert, 65 Okl. 168, 166 P. 195, 198, as follows: 'There is a distinction between acts that are quasi judicial and those that are purely judicial. A quasi judicial power is one imposed upon an officer or a board involving the exercise of discretion, judicial in its nature, in connection with and as incidental to the administration of matters assigned or intrusted to such officer or board. * * *"

Since the disposal of the application now pending before you necessarily involves consideration of evidentiary facts and a determination as to how the claims should be paid if they are allowed, it seems to us that you will necessarily act quasi-judicially in making a decision and determination of what should be done with the application. Therefore, your decision and determination will be subject to direct review by the courts as provided by law. In fact, the Supreme Court of Missouri, in the late case of Barker et al. v. Leggett, supra, said at 295 SW2d l.c. 840:

> "We believe it is the intent of the insurance code to vest the superintendent with primary jurisdiction to approve the usual expenses and to assess the expenses of proceedings against companies. We believe this right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, RSMo 1949, V.A.M.S., and more particularly § 536.100 dealing with judicial review of administrative decisions."

We now look to what provisions have been made by the Legislature to review such a decision as the one you are now called upon to make.

In an effort to implement the provisions of Section 22 of Article V of the Constitution, above quoted, the Legislature, in 1945, passed an act to provide for the judicial review of decisions, rules and regulations of administrative officers or bodies existing

under the Constitution or by law, and to provide for handling of contested cases (Laws of 1945, p. 1504, now incorporated in Chapter 536). The act provided methods for reviewing rules and regulations of various state agencies and also provided for judicial review of a contested case. The act defined a contested case as follows:

> "'Contested case' means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by statute to be determined after hearing."

Said act (§536.100, RSMo 1949) provides for a judicial review of a final decision in a contested case, in the following language:

> "Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review thereof, as provided in section 536.100 to 536.140, unless some other provision for judicial review is provided by statute; * * *"

It will be seen, therefore, that Section 536.100 and the other provisions of the act of 1945 only refer to a review of decisions in a contested case and for rules of various agencies. We do not find any statute which requires you to hold a hearing before deciding the application now pending before you, and therefore we do not think that the provisions of Section 536.100 would apply to a review of any decision which you may make on the applications.

The Legislature, evidently realizing that it had not made provisions for judicial review of decisions of administrative officers and agencies in cases other than those which it defined as contested cases, in 1953 enacted another act (Laws of 1953, p. 678). Said act, now numbered Section 536.105 of the statutes, reads as follows:

> "1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such

> decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.
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> "2. Nothing in this section shall apply to contested cases reviewable pursuant to sections 536.100 to 536.140.
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> "3. Nothing in this section shall be construed to impair any power to take summary action lawfully vested in any such administrative officer or body, or to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section."

It will be noted that the later acts specifically provide that it shall not apply to contested cases, that is, cases in which a statute requires that a hearing be had before a decision can be made. It seems apparent, therefore, that the decision which you make on the application of the applicants pending before you will be subject to review by the courts under the provisions of Section 536.105, supra, and not under the provisions of Section 536.100, supra.

We are not unmindful of the language of the Supreme Court in the recent case of Barker et al. v. Leggett, quoted above, wherein

the court said that a decision by the Superintendent on the claims of applicants would be subject to "review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, RSMo 1949, V.A.M.S., and more particularly §536.100 dealing with judicial review of administrative decisions." What the court was deciding in that case was that, since there were provisions for judicial review of any determination the Superintendent might make as to the claims of applicants, the applicants were not deprived of their rights without due process of law, as they were contending. In disposing of that contention, the court, later in the opinion, said (295 SW2d l.c. 840):

> "The plaintiffs further contend that denial to them of relief in this action is in violation of their rights under the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 10, 13 and 14, Constitution of Missouri 1945, V.A.M.S., in that the obligation of plaintiffs' contract would be impaired and they would be denied due process of law and equal protection of the law by destroying and denying to them any judicial or other remedy to enforce their contract. They also complain that the escheat law passed in 1941 unlawfully operates as an ex post facto for escheat of the fund without any provision for payment of plaintiffs' services.
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> "As we have pointed out, administrative remedies are provided with right of judicial review. We have considered these constitutional questions and find them to be without merit. * * *"

Therefore, the question ruled was that the appellants, applicants here, could obtain a direct judicial review of any decision or determination which the Superintendent of Insurance might make on their claims and it was not necessary to a decision of that case to point out under which particular section of the statutes their review could be obtained. The only thing necessary to decide was whether there were provisions for administrative procedures which were subject to judicial review - not what the mechanics of the procedures were. The statement in the opinion to the effect that the decision by the Superintendent on claims of applicants herein was subject to the provisions of Section

536.100 was obiter dictum and clearly an oversight. This is understandable because the court was not considering the mechanics of the review provisions, but was only considering the question of whether there were in fact administrative review provisions. The court said that the decision of the Superintendent would be subject to review in the manner provided in the Insurance Code, although there is no provision in the Insurance Code for such a review. This indicates that the court was merely deciding that there were provisions for administrative review and was not undertaking to pick out the particular sections of the statutes which provided for such review.

Therefore, we conclude that, under the provisions of Section 374.220, RSMo 1949, you do have jurisdiction to consider and determine the application now before you. As we have pointed out above, there is no statutory requirement that a hearing for such purpose be held. We think it obvious that the Superintendent is not required to hold a hearing on every claim or question that may be presented to him for determination. However, the circumstances of the present application may be such that denial of a hearing would be considered by a reviewing court to be an arbitrary and unreasonable act. Determination of the procedure is, we feel, primarily a matter within your discretion.

CONCLUSION

It is, therefore, the opinion of this office that you, as Superintendent of the Department of Insurance, do have jurisdiction to consider and pass upon the application of Messrs. Barker and Jacobs now pending before you.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harry H. Kay.

Yours very truly,

JOHN M. DALTON
Attorney General

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