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Administrative Law

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Administrative Law

by J. Michael Davis*

I. INTRODUCTION

The Eleventh Circuit Court of Appeals faced a number of Administrative Law issues in 1992, providing important decisions in the fields of immigration law and occupational safety. The decisions as a whole did not depart from standard principles of Administrative Law, however, the decisions did provide substantial refinements of those principles. The most compelling decision occurred in the field of immigration law and was the only decision to involve a dissenting opinion.

II. PRECLUSION OF JUDICIAL REVIEW

In the election year of 1992, the Eleventh Circuit was involved in one of the most political issues of that year, the migration of Haitian refugees and the interdiction and return of those Haitians by the United States

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Government. In *Haitian Refugee Center, Inc. v. Baker*,[1] the Haitian Refugee Center ("the Center") challenged the efforts of the United States Government, acting through the Coast Guard, to interdict and return Haitian refugees to Haiti.[2] The interdiction program, which began in September 1981, was discontinued for a short period of time following the overthrow of the President of Haiti on September 30, 1991.[3] However, the government reinstituted the program on November 18, 1991, and on November 19, 1991, the Center filed a motion for declaratory and injunctive relief in the District Court for the Southern District of Florida.[4] The district court granted the motion for a preliminary injunction on several grounds, but found that the Center's claim based upon the Administrative Procedures Act ("APA") did not have a substantial likelihood of success.[5] The district court specifically found that the actions of the Immigration and Naturalization Service ("INS") had been committed to Agency discretion and could not be reviewed under the APA.[6]

The Government appealed the district court's order to the Eleventh Circuit where the injunction was resolved and the case remanded to the district court.[7] The district court then issued a second temporary restraining order finding that the Center had established that there was a substantial likelihood that it would prevail on the claims made under the APA.[8] Subsequently, the Government appealed that order to the Eleventh Circuit.[9]

Among other claims, the Eleventh Circuit addressed the issue of whether the Center's claims under the Immigration and Nationality Act were reviewable under the APA.[10] The court first considered whether review under the APA had been precluded by the Immigration and Nationality Act itself.[11] The court reviewed the applicable statutes to determine if Congress had precluded judicial review of the Agency's decision.[12] After reviewing the above sections, the court found that:

> The extensive procedures set out in section 1252(b) and procedures for judicial review provided for pursuant to section 1105(a), along with the

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1. 953 F.2d 1498 (11th Cir. 1992).
2. *Id.* at 1502-03.
3. *Id.* at 1502.
4. *Id.* at 1502-03.
5. *Id.* at 1503.
6. *Id.* at 1504.
7. Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109 (11th Cir. 1991).
8. 953 F.2d at 1504.
9. *Id.* at 1504-05.
10. *Id.* at 1505.
11. *Id.* at 1505-06.
12. *Id.* at 1506; *see also* 8 U.S.C. § 1105(a), 1251-52(b), 1253(h) (1988).

> absence of procedures for judicial review provided in section 1157, demonstrate a congressional intent to preclude judicial review at the behest of aliens beyond the borders of the United States.[13]

The court buttressed this decision by citing to five prior decisions of both circuit courts and the United States Supreme Court.[14] The court found, based upon its review of both statutory and case law, that it was clear that the Immigration and Nationality Act did not provide for judicial review under the terms of the APA and therefore that review was precluded.[15]

The court also found that review under the APA was also precluded because the decision to repatriate the Haitians was a decision that had been committed to Agency discretion and that this discretion was so broad that it provided no law for the courts to apply when reviewing that Agency action.[16] The court again reviewed the statutory provisions in question and determined that repatriating the Haitians was, in fact, committed completely to Agency discretion.[17] However, the Center maintained that while the decision was at the Agency's discretion, the Agency was not following proper procedures to determine which Haitians should be repatriated.[18] The court, however, relying upon *Greenwood Utilities Commission v. Hodel*[19] and *Florida Department of Business Regulation v. United States Department of the Interior*,[20] found no actual guidelines for the Immigration and Naturalization Service to follow in making its determinations as to which Haitians to repatriate and thus there were no meaningful standards for the court to review under the APA.[21] Therefore, the court found that it could not review the Center's allegations under the APA.[22] The court supported its decision by referring to two United States Supreme Court cases, *Marcello v. Bonds*[23] and *Ardestani v. Immigration & Naturalization Service*.[24] In *Ardestani* the Court found that

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13. 953 F.2d at 1506.

14. *Id.* at 1506-07 (citing Brownell v. We Shung, 352 U.S. 180 (1956); Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Cobb v. Murrell, 386 F.2d 947 (5th Cir. 1967); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970 (9th Cir. 1986)).

15. *Id.* at 1507.

16. *Id.* at 1507-08.

17. *Id.* at 1508.

18. *Id.*

19. 764 F.2d 1459 (11th Cir. 1985).

20. 768 F.2d 1248 (11th Cir. 1985).

21. 953 F.2d at 1508.

22. *Id. See* 5 U.S.C. § 701(a)(2) (1988).

23. 349 U.S. 302 (1955).

24. 112 S. Ct. 515 (1991).

the Immigration and Nationality Act was specifically designed to provide that decisions made under the Act were not reviewable under the APA.[25]

Judge Hatchet dissented.[26] He believed that the Immigration and Nationality Act did not specifically preclude judicial review under the APA.[27] In so holding, Judge Hatchet reviewed not just the single Act but the entire "scheme of the United States's laws relating to the interdiction of Haitians on the high seas."[28] Judge Hatchet also disagreed with the majority's decision that the decision concerning repatriation was one which could not be reviewed under the APA as there were no meaningful guidelines for reviewing the Agency's exercise of its discretionary authority.[29] Judge Hatchet believed that the INS Guidelines were the appropriate authority and established standards that the court could use to evaluate the Agency's decisions.[30]

III. SUBSTANTIAL EVIDENCE

In another important decision, the Eleventh Circuit reviewed regulations proposed by the Occupation Safety and Health Administration ("OSHA") concerning workplace safety and exposure to certain toxic chemicals in the air. The Occupational Safety and Health Act of 1970[31] requires OSHA to establish permissible exposure limits for certain air contaminants. In 1989, OSHA issued a set of permissible exposure limits for approximately 428 toxic substances.[32] In *AFL-CIO v. OSHA*,[33] the AFL-CIO and various industrial groups or associations challenged these standards.[34] The court, operating under the substantial evidence standard of review, found in the Occupational Safety and Health Act, rejected OSHA's rule.[35]

Under the Act, OSHA is required and limited to regulating those workplace practices or substances which present a significant risk of material health impairment.[36] The court agreed that the toxic substances cited in the rulemaking constituted a material impairment; however, the court did

25. *Id.* at 518-19.
26. 953 F.2d at 1515 (Hatchet, J., dissenting).
27. *Id.* at 1521-22.
28. *Id.* at 1523.
29. *Id.*
30. *Id.* at 1523-24.
31. 29 U.S.C. §§ 651-78 (1988).
32. 29 C.F.R. § 1910.1000 (1992).
33. 965 F.2d 962 (11th Cir. 1992).
34. *Id.* at 969.
35. *Id.* at 969-70; *see* 29 U.S.C. § 655(f).
36. 965 F.2d at 973 (citing Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 641-42 (1980)).

not believe that substantial evidence existed to support the Agency's determination that these toxic substances constituted a significant risk at the levels proposed in the rulemaking.[37] The court was concerned that the Agency had attempted to regulate 428 of the toxic substances in a "generic" rulemaking without providing the necessary supporting documentation or information to explain how, and in what manner, each of the individual substances posed a significant risk.[38] The court went to great lengths to determine whether a reasonable and substantial basis existed for the standards set by OSHA and concluded that the Agency had not appropriately supported its decision.[39] To the contrary, the court found that OSHA had failed adequately to review or even compile information necessary to review the proper exposure levels for the toxic chemicals or whether the technology existed effectively to control the release of those chemicals in the workplace.[40] In this era of concern about the environment and workplace safety, this decision is important because it firmly establishes that the courts will review agency action under a very exacting standard and will not allow an agency to circumvent its responsibilities nor short cut the administrative procedures based upon the size of that responsibility. Indeed, the court stated that:

> We have no doubt that the agency acted with the best of intentions. It may well be, as OSHA claims, that this was the only practical way of accomplishing a much needed revision of the existing standards and of making major strides towards improving worker health and safety. Given OSHA's history of slow progress in issuing standards, we can easily believe OSHA's claim that going through detailed analysis for each of the 428 different substances regulated was not possible given the time constraints set by the agency for this rulemaking. Unfortunately, OSHA's approach to this rulemaking is not consistent with the requirements of the OSH Act.[41]

IV. ARBITRARY AND CAPRICIOUS

Hussion v. Madigan[42] concerned Farmers Home Administration's ("FmHA") change in regulations concerning lease terminations and evictions from FmHA financed housing. Unlike the decision in *AFL-CIO v. OSHA*, the court reviewed the rulemaking in question under the arbitrary and capricious standard of the APA.[43] This case represented a challenge

37. *Id.* at 975.
38. *Id.* at 975-76.
39. *Id.* at 977-82.
40. *Id.*
41. *Id.* at 987.
42. 950 F.2d 1546 (11th Cir. 1992).
43. *Id.* at 1550.

to an attempt by the FmHA to streamline the review procedures for lease terminations and evictions.[44]

FmHA had changed its regulations regarding administrative review of lease evictions to provide that lease terminations could only take place if they were based upon a material violation of the lease and the eviction could only take place if it was pursuant to a judicial action under state or local law.[45] Tenants affected by the regulations filed suit and the district court held that the regulations were arbitrary and capricious because the FmHA had not considered, or had ignored, comments regarding a potential situation in which state's laws would not be adequate to protect a tenant's right in the case of an eviction.[46] The court based its finding upon the conclusion that these comments had been presented to the FmHA during the comment period; however, the final rule did not appear to take these matters into consideration.[47] The Eleventh Circuit reviewed the reasoning provided by the FmHA for both the proposed regulation and the regulation as adopted, and disagreed with the district court's conclusion that the FmHA had acted arbitrarily and capriciously.[48] In so holding, the circuit court found that the Agency had cited sufficient information to support a need to amend the regulations to streamline the process, and had weighed the impact of that streamlining.[49] The court, giving deference to the Agency, found that:

> As the agency has "suppl[ied] a reasoned analysis" supporting the elimination of duplicative aspects of the process, neither this court nor the district court is authorized to "substitute its judgment for that of the agency" merely because evidence exists which conflicts with the agency's ultimate determination.[50]

This distinction highlights the difference between a review based upon substantial evidence and a review under the arbitrary and capricious standard. In *Hussion* the court found that while there was a basis to challenge the Agency's decision making, as long as the Agency's decision was supported in some manner and was not in conflict with the statute under which the Agency was operating, the Agency's decision would be afforded deference and affirmed.[51] However, under the substantial evidence test

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44. *Id.* at 1548.
45. *Id.* at 1549-50.
46. *Id.* at 1550.
47. *Id.*
48. *Id.* at 1552-54.
49. *Id.* at 1554.
50. *Id.* (citations omitted) (citing Lloyd Noland Hosp. & Clinic v. Heckler, 762 F.2d 1561, 1567 (11th Cir. 1985) and Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).
51. *Id.* at 1551-52.

established in *AFL-CIO v. OSHA*, the Agency is not afforded such deference but is required to support its action and, in effect, to reply to all reasonable challenges to the proposed action.

V. Deference to Agency Interpretation of Statute

In two cases involving the interpretation of statutes, *RJR Nabisco, Inc. v. United States*[52] and *Habersham Mills v. Federal Energy Regulatory Commission*,[53] the court ruled in favor of the agency, relying upon the doctrine of giving deference to an agency's interpretation of its statute, provided such interpretation is reasonable.[54] In *RJR Nabisco*, Nabisco disputed any liability for interest accrued on certain tax liabilities.[55] Specifically, Nabisco was concerned that the interest on the tax would not be considered simple interest, which would cease to run upon payment of the underlying debt, but rather the interest would accrue and compound until payment of not only the underlying tax assessment but the applicable interest as well.[56] Under the prior law, Nabisco's payment of the underlying taxes would cease the running of interest.[57] However, the Tax Equity and Fiscal Responsibility Act of 1982 required that interest be compounded and that the compounding of interest would begin on December 31, 1982.[58] Nabisco had paid its underlying tax liability prior to the December 31, 1982 deadline; however, Nabisco had not paid interest for the underlying tax by that date. The Internal Revenue Service ("IRS") viewed the interest as an outstanding debt upon which interest could be compounded after December 31, 1982 while Nabisco argued that it no longer owed a debt that could be compounded.[59]

The court, after reviewing the statute, found that the IRS's interpretation of the statute was reasonable in view of the legislative history and the wording of the statute.[60] The court further indicated that this deference to agency interpretation was even more critical in the area of tax laws thus indicating that it would take a higher showing to overturn the interpretation than Nabisco had made.[61]

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52. 955 F.2d 1457 (11th Cir 1992).
53. 976 F.2d 1381 (11th Cir. 1992).
54. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
55. 955 F.2d at 1458-59 (11th Cir. 1992).
56. *Id.* at 1459; *see also* Tax Equity and Fiscal Responsibility Act of 1982 § 344, Pub. L. No. 97-248, 96 Stat. 324, 635 (1982).
57. 955 F.2d at 1460.
58. *Id.*
59. *Id.* at 1465.
60. *Id.* at 1464-65.
61. *Id.* at 1464.

In *Habersham Mills*, the court again deferred to the Agency regarding interpretation of its own statutes. At issue in the case was whether two small hydropower dams used by Habersham Mills were subject to regulation by the Federal Energy Regulatory Commission ("FERC").[62] The court conducted a rather extensive analysis of FERC's basis for extending its jurisdiction to the two hydropower projects and found that the Agency's interpretation of its jurisdictional mandate was entitled to deference and thus the decision should be affirmed.[63]

VI. Failure to Exhaust

The court, in *Ferry v. Hayden*,[64] *Mullen-Cofee v. Immigration & Naturalization Service*,[65] and *Kobleur v. Group Hospitalization & Medical Services, Inc.*[66] faced the issue of exhaustion of remedies. In *Ferry* the court found that a civilian Air Force employee had failed to properly exhaust his administrative remedies when he filed his complaint before the wrong reviewing board.[67] Appellant maintained that the government should be equitably estopped from raising the exhaustion of administrative remedies defense because the government had provided him with erroneous information concerning how his claim should be appealed before the Merit Systems Protection Board.[68] While not expressly addressing the question of whether equitable estoppel could be asserted against the federal government, the court held that appellant would not be prejudiced by an assertion of the defense because there were no time limits for filing a complaint with the appropriate reviewing body and thus appellant could begin the action anew before the proper board without prejudice.[69]

Mullen-Cofee involved deportation proceedings under the Immigration and Nationality Act.[70] In this instance, appellant had an arguable defense to the deportation proceedings brought against him based upon a calculation of time spent in the United States. However, appellant failed to present this issue before the Board of Immigration Appeals and therefore the Eleventh Circuit refused to consider the claim.[71]

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62. 976 F.2d at 1382.
63. *Id.* at 1385.
64. 954 F.2d 658 (11th Cir. 1992).
65. 976 F.2d 1375 (11th Cir. 1992).
66. 954 F.2d 705 (11th Cir. 1992).
67. Plaintiff filed his action with the Merit Systems Protection Board and court found that the appropriate reviewing panel was the Office of Special Counsel. 954 F.2d at 660.
68. *Id.* at 661.
69. *Id.* at 661-62.
70. 8 U.S.C. § 1251(a)(1) (1988).
71. 976 F.2d at 1379-80.

In *Kobleur* the court faced a unique situation involving exhaustion under the Federal Employees Health Benefits Act.[72] Appellant was a retired employee of the Federal Bureau of Alcohol, Tobacco, and Firearms and suffered from Alzheimer's disease.[73] Appellant was covered by a private health insurance plan offered by the United States Office of Personnel and Management as authorized by the Federal Employees Health Benefits Act.[74]

The district court dismissed the case because appellant failed to exhaust his administrative remedies.[75] On appeal, appellant contended that the district court erred in concluding that the Federal Employees Health Benefits Act required exhaustion of remedies, and contended that the Office of Personnel Management was, in effect, creating an exhaustion requirement.[76] However, the Eleventh Circuit deferred to the Agency's interpretation not only of the statute but of its own regulations and found both to be reasonable.[77] The Eleventh Circuit went on to review the exhaustion issue from a discretionary standard relying upon the doctrine that the court has such discretion when exhaustion is created by agency regulation rather than by statute.[78] The court found that requiring exhaustion in this case was appropriate and that there were no exceptions to that doctrine which applied to appellant's case.[79]

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72. 5 U.S.C. §§ 8901-8914.
73. 954 F.2d at 707.
74. *Id.*
75. *Id.* at 708.
76. *Id.* at 708-10.
77. *Id.* at 711.
78. *Id. See also* Haitian Refugee Ctr., Inc. v. Nelson, 872 F.2d 1555, 1561 (11th Cir. 1989).
79. 954 F.2d at 711-13.