Administrative Law - Standing and Appealability

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Administrative Law—Standing and Appealability—The Pennsylvania Supreme Court held that an unsuccessful applicant for one of four horse racing licenses which the State Horse Racing Commission was authorized to grant had standing to bring an appeal after the granting of all four authorized licenses by the Commission, and that no abuse of discretion was shown in granting the licenses to the particular licensees.


The Pennsylvania Legislature enacted Act No. 331 to enable the commencement of thoroughbred horse racing with pari-mutuel betting in the State of Pennsylvania. The Act provided for the issuance of four licenses to be granted for a one year period for use up to one hundred days per year. These licenses were to be granted by an independent State Horse Racing Commission to be established by the Act. Appellant Man O' War was one of fifteen applicants for the four licenses and here brings suit against the individual members of the Commission challenging its decision-making process in granting the four licenses to applicants other than Man O' War and the constitutionality of the Horse Racing act itself. Appellant joins in the suit the four applicants receiving licenses: The Continental Thoroughbred Racing Association, Inc., Eagle Downs Race Track, Inc., Pennsylvania National Turf Club, Inc., and the Shamrock Racing Association, Inc. Although Appellant filed with the Commission for a Section 20 appeal to the Commission, the instant appeal came before the Supreme Court of Pennsylvania directly from the Commission's original decision by writ of certiorari. The Court held: 1. that Appellant had a case in which an appeal in the nature of broad certiorari would lie; 2. that Appellant individually had standing to bring the case before the Court; 3. that Appellant had

2. Pa. Stat. Ann. tit. 15 § 2670 (1968): "If the . . . Commission shall refuse to grant a license applied for under this act, . . . the applicant . . . may demand, within ten days . . . , a hearing before the Commission. . . ."
waived his procedural due process rights at the administrative level; and 4. that the Commission did not abuse its discretion in granting the four licenses.

I. Scope of Appealability

Before tackling the bigger issue of whether an appeal should lie in the nature of certiorari, the Court disposed of the question of which type of certiorari would apply, should it later be decided that an appeal lay in the nature of certiorari. In the historical development of certiorari, the scope of the appeals based on certiorari varied from broad to narrow certiorari. Broad certiorari indicated the scope of review used in appeals from inferior court decisions based on the application of a statute that was silent regarding appeals. Narrow certiorari became the scope of review from these same inferior courts, but in decisions based on legislation specifically stating that no appeal shall lie. The concept of certiorari is deeply rooted in common law. It is based on the belief that lower tribunals should be subject to appellate review of their application of justice, regardless of what legislation says to the contrary. The idea behind broad certiorari is that since the legislature has omitted any mention of appeal, the appellate court should therefore have the right to a broad review of the lower tribunal's decision. Broad certiorari, under Pennsylvania law, allows the Supreme Court to consider the record of the proceedings from the lower tribunal, including the testimony, to determine whether the findings were supported by competent evidence and whether any conclusions of law were erroneously made. Where the scope of review is narrow certiorari, the rationale in Pennsylvania is that the courts will give credence to the legislature's power to limit appeal. As a result, the appeal is limited to the question of whether the lower tribunal had proper jurisdiction over the case involved.
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Based on this law, the Court in this case disposed of the issue of broad versus narrow certiorari on the ground that since Act No. 331 was silent with regard to whether the Horse Racing Commission's decisions were "final" or "conclusive" or whether an appeal is prohibited, an appeal, if granted by writ of certiorari, should be in the nature of broad certiorari.7

II. APPEALABILITY BY CERTIORARI

At this point, Mr. Justice Roberts, speaking for the Court, discussed the more difficult question of whether or not the instant case was one where an appeal through certiorari should lie. The discussion was begun by the statement, based on Keystone Raceway Corp. v. State Harness Racing Commission,8 that for an appeal in certiorari to lie, the order or decision of the Horse Racing Commission must be "judicial in nature."9 In the development of certiorari from common law and into today's law, it has been felt that review by appellate courts by certiorari should lie such that it would not infringe upon legislative bodies. Therefore, the review of lower courts' or administrative bodies' decisions was limited to those which called for more than the mere enforcement of statutory law; specifically those decisions calling for the tribunal's judgment and the application of common law considerations in interpretation and reaching the decision; a decision-making

7. The Court here seems to have gone on the assumption that technically Man O' War is appealing from a grant of licenses to four other applicants; not from the refusal of a license to them. Following this assumption, Section 20 of Act No. 33 does not apply since a strict reading thereof would indicate it establishes review to the Horse Racing Commission, the Dauphin County Common Pleas Court and the Pennsylvania Superior Court only when a license, available for issuance, is not issued to anyone, thereby constituting "a license refused" (see Section 20, 15 § 2670). Under this interpretation, Act No. 331 is silent regarding an appeal from a grant of a license. This Court's opinion at 438 in footnote 2 appears to have said, however, that a Section 20 appeal from a refusal may well follow this appeal, while the brief of Appellant indicates such an appeal was denied. Brief for Appellant at 8, Man O' War Racing Association v. State Horse Racing Commission. Does the court's footnote indicate that Man O' War can appeal the case twice; once through Supreme Court certiorari for the grant of a license and again through Section 20 for the refusal of a license? Can Man O'War merely change the label on the appeal in order to facilitate this double appeal?


9. Although Keystone states this rule of law, that court, at 7, found it unnecessary to decide what is "judicial" since it dismissed the appeal on the ground that Appellant lacked standing. The foundation of this rule of law comes from In Rimer's Contested Election, 316 Pa. 342, 345-6, 175 A. 544 (1954), and Newport Township School District v. State Tax Equalization Board, 366 Pa. 603, 79 A.2d 641 (1951).
process which came to be called “judicial in nature.” This approach may sound logical, but the problems develop when trying to decide in a given case whether it is a decision of a “judicial” or “non-judicial” nature. Although Mr. Justice Roberts conceded that the definition of judicial was rather vague, he found a precise definition of judicial to be unnecessary; finding the facts of the Man O' War case clearly within the broad definition of judicial. From a reading of Act No. 331, the Court stated that the use of the word “judgment” as applied to the Commission's determination implied that the legislature intended that the Commission's decisions be judicial in nature. The Court gained further support from Section 20 of Act No. 331 which gave the Horse Racing Commission the power to administer oaths, examine witnesses, issue subpoenas, compel witnesses to testify, and produce relevant written material, all of which the Court felt are clearly functions of judicial bodies.

In speaking of the Horse Racing Commission's decision to grant the four licenses, this Court found additional support for the judicial nature (and thereby the appealability of the decision) by looking at the degree of public interest involved, citing Ritter Finance Co. of Levittown v. Myers. Ritter, however, never discussed whether the lower tribunal's decision was judicial in nature. Ritter had used public interest as a factor in determining whether the appellant had standing to bring the case before it. In Man O' War, on the other hand, the Court used the public interest analogy as support for the argument that it was a case where an appeal would lie (using public interest as an

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10. But see, 3 Davis § 24.02 at 391: “Nowhere can one find in modern opinions any reason why certiorari should not lie to review non-judicial as well as judicial action. The only purpose the classification serves is to perpetuate a system established centuries ago for reasons that are no longer relevant.”

11. This Court cites PA. STAT. ANN. tit. 15 § 2657 (1968): “If in the judgment of the State Horse Racing Commission, . . . it may grant such license. . . .”


13. Ritter, supra n. 5.

14. Ritter, supra at 476: “. . . we have not discussed or decided whether the act of the Secretary of Banking . . . was judicial in nature, i.e., judicial or quasi-judicial.” Although this writer must have sympathy with this court in its attempt to separate the discussion of appealability by certiorari and of Appellant's standing in the Ritter case, a close reading of the cases cited in Ritter reveals that the public's interest has traditionally been used as a consideration in determining an Appellant's standing; not the appealability by certiorari. The Ritter case at 470-76 shuffled Pennsylvania law regarding appeal by certiorari and standing of the parties into a state of confusion from which subsequent Pennsylvania administrative law cases have yet to recover.
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element of judicial nature, itself a factor of appealability). It is reason-
able to assume, however, that many of these subtle distinctions and
technical differences traditionally used in finding appealability on the
one hand and standing on the other are not worthy of separation. It
seems only proper that the public interest factor involved in a given
case might well have relevance both to appealability by certiorari and
the appellant's standing to bring the case before the Supreme Court of
Pennsylvania. Therefore, the Court in Ritter and Man O' War appear
justified in considering public interest in determining both judicial
nature (as related to appealability) as Man O' War did, and in deter-
imining standing as did Ritter. It is submitted that the failure of Man
O' War is that it didn't spell this out. It insisted on trying to apply the
mechanical rules of the past instead of flatly stating that it was departing
from the game of technical and unrelated separation of considerations.
As a result of this failure, Pennsylvania law regarding appealability by
certiorari and standing from administrative decisions is left to flounder
between how Ritter and Man O' War state precedence, and what the
precedence actually says. This confusion will exist until a clear stat-
ment of the law is made and past cases in conflict are explicitly overruled
where necessary for clarity.

In continuing its discussion of whether the Commission's decision
was of a judicial nature, the Court considered the substantial nature
of the property rights involved in the Commission's determinations
as another way of finding the decision's judicial nature and thereby the
court's right to grant certiorari. This test has traditionally been one
applied most indiscriminately by the courts as a handy tool to avoid
hearing cases if such was their wish. Mr. Justice Roberts, however,
minimizes the influence of this right versus privilege argument. Previous
Pennsylvania cases found property rights of a substantial nature to
exist only when property of an Appellant was created by previous
administrative decisions. This Court looked at property rights in a
wider, more realistic view. In the instant case the Court recognized that
Man O' War and the other applicants have, of necessity, spent much
money in the preparation of their applications for licenses and in

15. Supra, Newport Township, n. 7 and this Court cites Tahiti Bar, Inc. Liquor
16. I.e., Where a license is up for revocation.
17. Including a $1,000 application fee.
planning their tracks in order to convince the Horse Racing Commission of their earnestness and competence. In addition, the amount of money at stake for the successful applicant and for the public through tax revenue from the track operations is a type of property and clearly of a substantial nature. The fact that the Court has granted certiorari for the Appellant to appeal directly to the Supreme Court demonstrates the Court’s recognition of the great expense of leaving a situation such as this in limbo for any substantial length of time. If in fact the test of substantial property rights is a valid consideration in determining the appealability of any given administrative decision, it is clear that this Court’s contribution to the test has been to make it far more credible.

III. Man O’War’s Standing

After determining that an appeal does lie on issues brought for review by Appellant, the Court turned to the question of whether or not Man O’War Racing Association had standing to bring this case before the Supreme Court. Citing the Keystone case, the Court stated that for Man O’War to have standing, a “direct interest in the subject matter of the particular litigation” is necessary and that this interest “must be immediate and pecuniary.” The Court in Keystone had said that Appellant, an unsuccessful applicant, lacked standing to appeal the grant of several licenses because there were still three licenses to be issued. Justice Roberts dealt with Man O’War as the logical extension of Keystone. Here, Appellant was appealing the grant of licenses after all of the licenses authorized had been issued. This Court’s decision on standing is made easier by Keystone’s clear implication that if a factual situation similar to Man O’War ever occurred, standing would lie. Another big factor making this Court’s decision on standing easier

18. But see; 3 Davis, ADMINISTRATIVE LAW TREATISE, § 24.02 at 395 (1958).
19. See, Horneby v. Allen, 326 F.2d 605 (5th Cir. 1964) at 609: “calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allowing them to exercise on uncontrolled discretion.”
20. The concept of standing, originating in common law, is quite alive today in U.S. judicial restraint which requires a “case or controversy” between the parties before a suit can be brought. Muskvat v. United States 219 U.S. 346 (1911). The purpose of standing is to require the one bringing a case before a judicial body to have a strong interest in the issues before the case, lest the court be bogged down with moot questions and collusive suits to obtain res judicata.
22. Id.
was that since the State Attorney General represented the Commission, Man O' War and similar aggrieved applicants were the only parties who would ever raise an appeal.23

IV. PROCEDURAL DUE PROCESS RIGHTS

Having granted standing to Man O' War, the Court turned to the issues of procedural due process raised by Appellant. Mr. Justice Roberts dismissed all of the due process issues raised except the claim of the procedural right to cross examination at the administrative hearing.24 The extent of the Court's discussion of the right of cross examination was to say that it deserved consideration. At this point the Court dealt with Appellee's claim that any procedural rights that Man O' War might have had were waived at the administrative level. The Court agreed with Appellee's contention since Man O' War received notice of the proposed administrative procedure sufficient to allow ample opportunity for objections to be heard and alternatives suggested.25 Although this decision foreclosed any further discussion by the Court of procedural due process, Mr. Justice Roberts' mention of the possible merit of Appellant's claim of cross examination leaves the door open to many possibilities. Specifically, Man O' War was urging that due process required that they be given an opportunity to cross examine the witnesses presented by the successful applicants, which would imply that the cross examination would come after the granting of the licenses. But, in addition, Man O' War argued that their factual situation was

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23. As an alternative to the moving party's individual interest, standing is also granted when the public as a whole has an interest to be protected in the case at hand. When standing is granted on this basis, the moving party serves as the representative of the public's interest in the case; sort of a "private attorney general" (see F.C.C. v. Snaders Bros. Radio Station, 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869 (1940) and 3 Davis, Administrative Law Treatise § 22.05 (1958)).

24. Appellant challenged the constitutionality of the Horse Racing Act itself on grounds that there was: 1) No holding of comparative hearings of all applications prior to the grant of the four licenses, 2) No opportunity to have witnesses under oath, to cross-examine them, to offer evidence, and make arguments against an application, 3) No opportunity to a hearing of all the evidence, and 4) No reasons set out by the Commission to back up its finding and give the Supreme Court something from which to judge for abuse of discretion; Brief for Appellant at 9, Man O' War v. State Horse Racing Commission.

25. The undisputed facts indicate that at several points in the process of application, applicants were encouraged to comment on the proposed procedure for consideration of the applications. Appellant was silent on every such occasion.
like that in *Ashbacker Radio Corp. v. F.C.C.*\(^{26}\) since the licenses to be granted in both cases were "mutually exclusive."\(^{27}\) In *Ashbacker*, there was one license available and two applicants, the loser of which had no hearing until after the license was granted. The Supreme Court said that this was a hollow right since the grant of all available licenses makes the loser's appeal fruitless and therefore, the hearing must occur before the licenses are granted. By stating that Man O' War's cross examination argument is worthy of consideration, is the Pennsylvania Supreme Court implying that *Man O' War* too might be a "mutually exclusive" situation and that a full hearing with cross examination should occur before the granting of any of the licenses?

V. Abuse of Administrative Discretion

Having disposed of the questions of procedural due process, the Court discussed Appellant's contention that the Commission had abused its discretion in granting the licenses. Justice Roberts contended that abuse of discretion is grounds for overturning the administrative decision only when it is a "clear abuse."\(^{28}\) In a discussion of the many considerations made by the Commission in coming to its decision, the Court made a strong case for the rational basis of the Commission's decision. The Court could not overrule the Commission's finding merely on the basis of bad judgment; a misapplication of the law or the exercise of judgment that was "manifestly unreasonable and the result of bad faith"\(^{29}\) would have been necessary. Man O' War presented much evidence to shade possible doubt on the merit of the Commission's judgment but fell far short of constituting bad faith or true abuse of discretion.

**Conclusion**

The Court on the whole in *Man O' War* seems to have handled the issues in a very sophisticated manner, resisting the temptation to fall

\(^{26}\) 326 U.S. 327 (1954).

\(^{27}\) Id., at 333.


\(^{29}\) Mielcuszny v. Rosol, 317 Pa. 91, 176 A. 236 (1934) is cited by this Court.
back on the many ancient inflexible rules used in handling administrative appeals. The Court appears to be attempting to establish law that will be based on the reasoning behind the rule rather than just the rule itself. The Court has succeeded in this attempt with its discussion of the issue of standing. Instead of being bound by any strict rule for the answer, it looked at the facts of the instant case and came up with a clear and justifiable answer based on logical extension of the reasoning in *Keystone* and a realistic look at the State Attorney General's inability to serve the public interest. The Court also appears to have been successful when it discussed the right versus privilege concept regarding the property rights at stake in this case. The Court rejected traditionally narrow views of property rights and flatly recognized the obvious existence of valuable property rights in this case. The Court, however, seemed to fall back on the application of the strict rule when it came to its discussion of the public interest involved in *Man O' War*. Without even challenging the idea of whether the public interest element had been properly limited solely to consideration under appealability, the Court proceeded to use confused precedence to unwittingly reaffirm the old rule limiting its use to appealability. However justified the *Man O' War* Court may have been in using public interest in its particular discussion of appealability, it left more confusion regarding future use of public interest by its slanting of the traditional rule of public interest, as *Ritter* had also done, in order to make it appear that it was applying the rule as it had always been. It is submitted that this has resulted in the lack of predictibility for future cases with respect to the scope and weight to be given the public interest consideration on appeals from administrative decisions.

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