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Administrative Law - Preinduction Judicial Review of Reclassification for Delinquency by Selective Service System Local Board - Oestereich v. Selective Service System Local Board No. 11

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CASE NOTE

ADMINISTRATIVE LAW—Preinduction Judicial Review of Reclassification for Delinquency by Selective Service System Local Board. Oestereich v. Selective Service System Local Board No. 11, 89 S. Ct. 414 (1968).

James J. Oestereich was enrolled as a student at a theological school preparing for the ministry and was classified IV-D by the Selective Service Board under section 6(g) of the Selective Service Act.¹ He returned his certificate of registration to the government as an act of dissent to United States' participation in the war in Vietnam. His board declared him delinquent for failure to have his certificate of registration in his possession under Section 1617.1 of Selective Service System regulations and for failure to notify the board of his local status. The board reclassified him I-A. Oestereich took an administrative appeal, lost and was then ordered to report for induction. He then brought suit to restrain his induction. The government challenged the suit under Section 10(b) (3) of the Military Selective Service Act of 1967,² which provides that there shall be no preinduction judicial review of the classification or processing of any registrant under the act. *Held*: A selective Service registrant who was exempt under 6(g) of the Selective Service Act could not be deprived of that statutory exemption through the use of Selective Service regulations governing delinquency, where the registrant was reclassified I-A after he turned in his certificate of registration to the government.

In an earlier act³ Congress chose to remain silent on the question of judicial review and the question was raised by *Falbo v. United States*.⁴ In that case the petitioner was classified as a conscientious objector over his protest that he should have the ministerial exemption. The petitioner sought judicial review of that classification, contending that such review was a constitutional requirement. In holding that congress was not required to provide for judicial review prior to final acceptance of the registrant for national service the Supreme Court set a pattern which has seldom been altered. Judicial review of classification of a registrant under the

1. 50 U.S.C. APP. § 456(g) (1964).

2. 50 U.S.C. APP. § 460(b) (3) (Supp. III 1967).

3. Act of Sept. 16, 1940, ch. 720, 54 Stat. 885 (1940).

4. 320 U.S. 549 (1944).

Selective Service Acts can only come as a defense to a criminal prosecution.

In 1946, the Supreme Court distinguished *Falbo* in *Estep v. United States*.⁵ Here again it was the ministerial exemption (so important to the holding in *Oestereich*) which brought forth the issue of judicial review. In *Estep*, the petitioner, a Jehovah's Witness, claimed the ministerial exemption but was classified I-A (available for military service) by his local board. The petitioner raised the act of classification by the board as a defense to criminal prosecution for failure to carry out a duty required by the act.⁶ In stating that *Falbo* did not preclude the judicial review of the classification, the Court stated in an opinion by Mr. Justice Douglas "[w]e cannot read section -- [50 U.S.C. sect. 311] as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction."⁷ The opinion goes on to find that the local board did in fact go beyond their jurisdiction stating that "[t]he question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."⁸ It was clear that the power of the local board was not to be taken lightly since relief in a court of law would be difficult to come by.

Estep also presents another ray of hope for the registrant who feels that he was wronged by his local board. Should the possibility of losing a criminal prosecution and suffering the consequences of a felony conviction be too much for the less determined, the alternative is habeas corpus proceedings after submission to induction.⁹ The court "assumed" that habeas corpus was available only after induction into the armed services.

5. 327 U.S. 114 (1946).

6. 54 Stat. 893 (1940).

7. 327 U.S. 114, 121 (1946).

8. *Id.* at 122-23.

9. *Estep v. United States*, *supra*, note 7 at 124.

The habeas corpus issue was raised in *Eagles, Post Commanding Officer v. United States ex rel. Samuels*¹⁰ where the registrant claimed a ministerial exemption (IV-D under the 1940 act) but was classified I-A and ordered to report and did in fact report for military service. In discussing the challenge of classification by the local board Mr. Justice Douglas pointed out the use of habeas corpus as a method to this end. "The function of habeas corpus is not to correct a practice but only to ascertain whether the procedure complained of [classification by local board] has resulted in an unlawful detention."¹¹ Regardless of the possibilities of abuse, the petitioner must show that the particular proceeding must be so corrupt as to be unfair.

Prior to the principal case, then, there were two methods of obtaining judicial review of the classification by a local board. First, judicial review would be allowed where there was no basis in fact for the classification assigned; and second, habeas corpus after induction. It is the purpose of this note to determine the effect of the *Oestereich* holding on the judicial review question.

The facts of the case do not shock the senses and are not particularly new. In both *Falbo*¹² and *Estep*¹³ the ministerial exemption was in question. The important fact here is the method employed by the board to reclassify the registrant. A rather unique method of delinquency classification was employed to deprive the registrant of his obvious statutory exemption. In returning his draft card to the government the registrant had become delinquent.¹⁴ The use of this method of reclassification was advocated in the now famous Hershey memorandum.¹⁵ It was apparently this power that the case sought to examine. In discussing the use of delinquency for reclassification the court per Justice Douglas stated that to follow the power inherent in such an approach is to "make the Boards free-wheeling agencies meting out their brand of justice in a vindictive manner."¹⁶ The opinion then goes on

10. 329 U.S. 304 (1946).

11. *Id.* at 315.

12. 320 U.S. 549 (1944).

13. 327 U.S. 114 (1946).

14. 32 C.F.R. § 1617.1 (1969).

15. S. Doc. No. 82, 89th Cong., 2d Ses. p. 4 (1966).

16. 89 S. Ct. 414, 416 (1968).

to explain that a draft exemption granted by congress can not be removed by the action of the local board, giving notice that the discretion of the board is not greater than the discretion of congress. Unfortunately few draft exemptions are as clear on their face as the ministerial exemption¹⁷ and therefore, the discretionary factor is not nearly as clear in other areas as we find in *Oestereich*.

Another concept raised by the line of cases discussed here is that before one can challenge the actions of a local board, he must first submit to a criminal prosecution for failure to comply with an induction order. The cases supporting this position are so numerous that citation here would be futile. However, a few excerpts might clarify the position taken by the courts on the matter. In *Foster v. United States*¹⁸ Judge Ainsworth stated "Congress chose not to give administrative action under the Act the customary scope of judicial review;"¹⁹ *Wiggins v. United States*²⁰ states "[i]n the Universal Military Training and Service Act Congress limited the scope of judicial review more severely than Congress usually limits review of administrative action:"²¹ and finally and more clearly it has been stated that the range of judicial review under the Selective Service laws is "the narrowest known to the law."²²

Oestereich seems to lend support to the position already made clear that the courts will not act as a "super board" in reviewing draft classification in spite of the judicial stripping of the hands of the local boards.

A look at the subsequent treatment of the *Oestereich* decision seems to give little assistance to one seeking an escape of the draft through analogies drawn from *Oestereich*. The most likely analogy would appear to be a II-S or student deferment classification which on its face limits somewhat the discretion of the board as to qualifications for the deferment.²³ When the case arose, however, the analogy failed.²⁴

17. See for example: 5 U.S.C. APP. § 456(h) (1) or (2) (1964).

18. 384 F.2d 372 (5th Cir. 1967).

19. *Id.* at 373.

20. 261 F.2d 113 (5th Cir. 1958).

21. *Id.* at 114.

22. *Parrott v. United States*, 370 F.2d 388, 396 (9th Cir. 1966).

23. 50 U.S.C. APP. § 456(h) (1) (1964).

24. *Breen v. Selective Serv. Local Bd. No. 16*, 37 U.S.L.W. 2433 (2d Cir. Jan. 10, 1969).

Under circumstances similar to those in *Oestereich*, the registrant was reclassified as a delinquent from II-S to I-A. The Second Circuit reversed its position taken prior to *Oestereich* in *Wolff v. Selective Service Local Board No. 16*,²⁵ which followed the analogy pointed out above in allowing preinduction judicial review for reclassification from II-S to I-A. In doing so, however, the court per Judge Friendly relies upon the following language:

We consequently find no sufficient justification in this case for denying to the words of the 1967 amendment to § 10(b)(3) the meaning which they so plainly have and which the committee reports, set forth in the dissenting opinion in *Oestereich* show they were intended to have. As recognized by Justice Harlan's concurring opinion in *Oestereich* . . . Section [10(b)(3)] was *likely* precipitated by the Second Circuit's well publicized decision in *Wolff*.

If Congress meant to withhold the preinduction review we had granted in *Wolff* to students enjoying deferments who had been declared delinquent for acts not within the regulations, it surely must have intended to do this where, as here, there has been an undisputed violation of [the regulations] requiring continued possession of a certificate.²⁶

By doing this, the Second Circuit seems to rely on the reasoning of the concurring and dissenting opinions to substantiate a position which fails to recognize the reasoning of the majority, *i.e.* where Congress has granted an exemption (or deferment as the case may be) the local board may not go beyond its discretionary functions in determining the facts through the use of delinquency classifications.

Another recent case²⁷ lends support to the analogy without having to decide the issue. In this case a graduate student deferment subject specifically to discretion of the local board²⁸ was in question but in discussing the problem of undergraduate deferments, Judge Mathes states in his opinion "if

25. 372 F.2d 817 (2d Cir. 1967).

26. *Breen v. Selective Serv. Local Bd. No. 16*, *supra* note 24.

27. *Kolden v. Selective Serv. Local Bd. No. 4*, 36 U.S.L.W. 2434 (8th Cir. Jan. 28, 1969).

28. 5 U.S.C. APP. § 456(h)(1) (1964).

appellant here had been an undergraduate student duly possessing a II-S classification who had been reclassified I-A for reasons other than ceasing to be a full-time student in good standing, the case would be more closely analogous to *Oestereich's* situation.²⁹

With only these two opinions available and one of them covering the subject only by the way of dictum, it is difficult to say that *Oestereich* carries with it any real force in situations other than the statutory ministerial and divinity student exemption, but it can be said that if one were expecting great things to arise from this recent attack on the Selective Service System, he must be disappointed thus far.

No new law was made; only a reaffirmation of the courts hesitancy to delve into the mysterious workings of the Selective Service System local boards can be seen. The law has apparently escaped the attack unscathed.

TERRENCE MACKEY

29. *Kolden v. Selective Serv. Local Bd. No. 4*, *supra* note 27.