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Ivan C. Rutledge
University of Washington School of Law

ADMINISTRATIVE TRIAL EXAMINERS: THE ANONYMOUS "MASTERS"

IVAN C. RUTLEDGE*

When an issue of fact is tried to a jury, there is a solemn procedure for determining who made the decision. If the clerk polls the jury he intones first, "Is this your verdict?" then, "Is this the verdict of the jury?" There is no question as to who made the decision, because each juror in turn accepts or rejects responsibility for it.[1] When a case is referred, the parties are afforded an opportunity to know what the recommendations of the referee are, by the filing of his report for the clerk.[2] Likewise, the court as trier of the facts is required to give its decisions in writing and file them with the clerk.[3]

Perhaps the first leading case to interrupt the tradition that the trier of the facts must be identified and accessible, so that evidence and argument may be addressed directly to him is *Local Government Board v. Arlidge,*[4] decided by the British House of Lords in 1914. In that case someone in the government decided to close a dwelling on the ground that it was unfit for human habitation (unsanitary). The lessee, Arlidge, knew that an inspector had held a public inquiry, and had made a report, but he was never permitted to see it. The final appellate body sanctioned the procedure. In support of its conclusions these considerations were adduced: Parliament may, by saying so, affect "property and the liberty of a man to do what he chooses with what is his own" and the question is only as to what Parliament has said. In construing the statute it is necessary to consider the nature of the tribunal, whether it is "administrative and not in the ordinary sense judicial." The Minister at the head of the Board is so busy that he cannot be expected to discharge all his duties personally. All that is required is that the work be done in good faith, listening fairly to both sides, and in accordance with the usual practice. (Viscount Haldane). The seal of the Board enjoys a presumption of regularity and its members are "sev-

* Professor of Law, University of Washington.

[1] RCW 4.44.390.

[2] RCW 4.48.080. In federal practice the clerk is required to notify the parties of the filing. FED. R. CIV. P. 53 (e) (1).

[3] RCW 4.44.050; General Rules of the Superior Courts 17 and 15, which require notice of submission of findings of fact, and which render a judgment entered without findings of fact in non-jury cases subject to a motion to vacate. See also FED. R. CIV. P. 52.

[4] [1915] A.C. 120.

eral men of eminence." The judiciary must recognize that the Executive operates under ministerial responsibility in Parliament, and the decisions of the Board need never be based on an actual meeting of its members. Disclosure of internal staff deliberations would impair the morale of the inspectors, secretaries, assistants, and consultants. "Natural justice" is whatever the statute prescribes, or else it is a vacuous phrase. (Lord Shaw of Dunfermline). The required procedure was fair and was followed, even though the respondent did not get to see the report, inasmuch as he had a full opportunity to present his case, and the evidence was fully considered, as appears from the affidavit of the Permanent Secretary of the Board. (Lord Parmoor). The phrase "contrary to natural justice" is meaningless in connection with this case. If the procedure prescribed by the statute were not fair, the conclusion could only be that the judge disapproved of the legislation, which is irrelevant. It would be "decidedly mischievous" to make it a practice to publish the reports of inspectors. (Lord Moulton).

Thus Arlidge failed in his objections that the procedure did not give him an opportunity to rebut the contents of the report if they should turn out to be adverse to him, and that he never did get to know what officer finally decided against him on the facts.

This case was distinguished in *Morgan* v. *United States*[5] (hereinafter identified as *Morgan* I). The court tersely said that "it relates to a different sort of administrative action and is not deemed to be pertinent to a proceeding under the statute before us and to the hearing which is required by the principles established by our decisions."[6] The holding was that the plaintiff was entitled to allege: that the Secretary of Agriculture had not personally considered the evidence adduced at the hearing on the order, although he signed the order. The court said that the "full hearing" required by the statute has reference to the tradition of judicial proceedings, and means that if the one who determines the

[5] 298 U.S. 468 (1936).

[6] *Id.* at 482. The difference between the administrative actions is that in the British case, although ministerial responsibility exists as a safeguard against oppressive executive action, the private rights involved were those of ownership of land, whereas in Morgan I the action was a type of rate-making under standards set by Congress. The court said that the order was "legislative" and gave to the proceeding "its distinctive character" and hence not one of "ordinary administration." *Id.* at 479. Would "ordinary administration" that forfeits rights in land call for a less judicialized procedure than rate-making? The difference is more readily explicable on the other two elements of distinction suggested by the court: the statute required the Secretary of Agriculture to hold a "full hearing" instead of the "public local inquiry" required of the Board; and the "principles established by our decisions" reflect a separation of powers in which ministerial responsibility seems sometimes to be mainly characterized by avoiding the attention of Congressional investigators, and in which due process is a limitation on legislative power, enforced by judicial review.

facts supporting the order did not consider evidence or argument, the hearing has not been given. The vigor of the maxim that he who decides must hear was weakened in subsequent phases of this litigation. Finally, in *Morgan* IV, the court said that the trial court should never have indulged plaintiff's scrutiny into the mental processes of the Secretary.[7]

Subsequent federal legislation has dealt with the problem. For example, the Administrative Procedure Act lays extensive restrictions upon the process of delegating to trial examiners the conduct of hearings.[8] The general subject covered by them is administrative decision required by statute to be made after hearing and on the basis of the evidence in the record. The agency may itself have "presided at the reception of the evidence," or it may have delegated the conduct of the hearing to officers who have the statutory qualifications. (*Morgan* I did not consider the question of delegation as such, because, as the opinion pointed out, the case was not one where the Secretary of Agriculture had authorized a subordinate to hold the hearing *and* make the decision.) If, except in making rules or determining applications for initial licenses, the agency does not itself hold the hearing it must also delegate to the hearing officer a share in the decision-making process.[9] In this sense, the maxim is converted to: "He who hears must decide," at least in part. The hearing officer may make an "initial" decision, which becomes the decision of the agency in the absence of agency review. The alternative is that the one who conducts the hearing must make a recommendation or "intermediate report" to the agency. This goes along with the entire record to the agency, thus giving it the benefit of his evaluation of demeanor evidence or at least providing the parties to the hearing with indirect access to the ultimate trier of the facts.

Furthermore, the Act provides the parties with constant participation in the decision-making process. They are entitled to propose findings and to make exceptions, objections, and arguments against findings made or recommended by the hearing officer.[10] The agency itself is

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[7] United States v. Morgan, 313 U.S. 409 (1941). The trial court through all four phases was never able to get the holding of the Supreme Court straight, according to the Supreme Court. See GELLHORN AND BYSE, ADMINISTRATIVE LAW 1116-1145 (1954); DAVIS, ADMINISTRATIVE LAW 331-336 (1951).

[8] 60 STAT. 237 (1946), 5 U.S.C. § 1001 *et seq.* (1952). Sections 5 (c), 7 and 8, 60 STAT. 240-242, 5 U.S.C. §§ 1006 (c), 1008 and 1009, are pertinent here.

[9] *Id.*, § 1009 (a). In the excepted instances the agency may in an emergency dispense with delegation of any decision-making or it may take recommendations from any responsible officers of the agency whether or not they conducted the hearing.

[10] *Id.*, § 1009 (b).

bound to permit exceptions, arguments, and proposals of findings against its "tentative" decisions.[11]

Hence the Administrative Procedure Act tolerates the division of hearing and deciding only on condition that the parties are advised of the process of decision and are enabled to participate in it. The greatest scope permitted the "institutional decision"[12] is in rule making or determining initial licenses, where the agency can have one officer take the evidence, and any number of anonymous administrative "masters" analyze, consult, and evaluate. That is, the agency can have one officer take the evidence and others submit reports on it with or without a report from the hearing officer. *Morgan* I, like the House of Lords, recognized the pressure of business in an administrative agency, and conceded that the evidence taken before an examiner could be "sifted and analyzed by competent subordinates."[13] *Morgan* II, however was needed, to instruct the trial court that there was a qualification in that case; if the subordinate analyzes, his analysis must be disclosed to the party.[14] The Administrative Procedure Act brings clarity to the requirements in the cases upon which it imposes the initial or recommended decision procedure. In those cases the party can in a sense sit down in the back room with the decision makers.

The Model State Administrative Procedure Act, in Section 10, also contains provisions that afford an opportunity to propose findings and cite portions of the record to the agency, in cases where the agency did not hear or read the evidence, before the final decision is made. There is, however, no requirement of an intermediate report, or any nonpartisan vehicle for conveying extra-record information about the hearing to the agency.

The Labor Management Relations Act of 1947, better known as the Taft-Hartley Act,[15] also dealt with this problem, in two ways. First, it specified that if a hearing officer conducts the hearing his recommended order, like the "initial decision" under the Administrative Procedure

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[11] A "tentative" decision is a preliminary one made by the agency after the trial examiner has held the hearing. It is permitted, in making rules or initially licensing, in lieu of a recommended or initial decision from the hearing officer.

[12] See DAVIS, ADMINISTRATIVE LAW c. 8 (entitled *"Institutional Decisions"*) (1951).

[13] 298 U.S. 468, 481 (1936).

[14] Morgan v. United States, 304 U.S. 1 (1937). The court referred to Morgan I as follows: "The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding." *Id.* at 21.

[15] 61 STAT. 136 (1947), 29 U.S.C. § 141 *et. seq.* (1952).

Act, becomes final unless exceptions are taken to it.[16] Second, it abolished any section of transcript-reviewers or opinion-writers, and substituted assistants to individual members of the Board, in the manner of law clerks.[17]

A number of administrative agencies in the State of Washington have contributed information concerning their practice in connection with trial examiners. The purpose of this paper is to report the information so contributed. The report is subject to two limitations. One is that the information is about two years old, and the other is that the pledge of confidence under which it was obtained requires that it be presented in the form of statistical summary. The responses of fifteen agencies are combined with communications from members of the Committee on Administrative Law of the Washington State Bar Association and members of the staff of the Attorney-General.[18]

Four of the agencies are not required to conduct hearings, and three of them make their decisions without hearings, either because the decisions are quasi-legislative and are appropriately arrived at by consultation without hearing, or because the decisions are quasi-judicial only in the sense that they apply to specific persons. In the Departments of Fisheries and Game the decisions have the former characteristic. The latter is the case in the Division of Banking, where the dispositions are based upon investigative processes without adjudication, which must be obtained by application to the judiciary.[19] The "hearings" of the Board of Prison Terms and Paroles are likewise investigative rather than in the nature of adjudication. The prisoner has no legally protected interest to vindicate by adjudication, so long as the Board is

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[16] *Id.* § 160 (c).

[17] *Id.* § 154 (a).

[18] The chairman of the Administrative Law Committee, E. K. Murray, Esq., of Tacoma, was especially helpful. For example, he rounded up and redirected an inquiry that had gone astray, after one of the departments had forwarded the inquiry to the State Bar Association, with a disclaimer of information about its own procedure! This department, and all other agencies from whom information was sought, except one, were very cooperative and helpful.

[19] One of the statutes administered by the Division, the small-loan act, RCW 31.08, has had a tortuous career in the courts. First it was held a constitutional regulation of a business regarded by the court as legitimate, although the act imposes rigid control over access to such enterprise, partially on the ground that the applicant for a license would get a *de novo* determination in court if he was denied a license. Kelleher v. Minshull, 11 Wn.2d 380, 119 P.2d 302 (1941). Then the court deleted the *de novo* provision as unconstitutional and thereby apparently abolished any right to a hearing on the facts. Household Finance Co. v. State, 40 Wn.2d 451, 244 P.2d 260 (1952); and see 28 WASH. L. REV. 146 (1953).

acting within its discretion under a valid sentence.[20] These four agencies represent functions that involve no adjudication in the sense that a trial hearing is involved. In this respect they fall into three types of functions: old-line executive functions of investigation with or without prosecution, as in the Game Department; dispositions that involve private interests that are not entitled to protection by adjudication, as in the case of prisoners, or that are subject to judicial correction, as in the case of bank licensing; and quasi-legislative decisions.[21]

Of the remaining eleven agencies, one delegates completely to a subordinate officer the making of the decisions as well as the conduct of the hearings. Four other agencies hold their own hearings. As to these five, then, there is no serious problem of the anonymity of the trier of the facts. Three agencies uniformly delegate the hearing function to a subordinate while reserving to themselves some measure of decision-making power; the remaining three also do so in some cases although in others they hear the cases. These six agencies, then, provide the primary subject of this study.

One of them is barely within the scope of the study, however, in that, as in the instance above, the decision of the examiner is the decision of the agency. The difference is that here the decision of the examiner may be reviewed by the agency, either on exceptions or on motion of the agency, as in the case of the "initial" decision under the Administrative Procedure Act. In such a case the agency considers the entire record taken before the examiner and has the benefit of the examiner's decision, which is known to the private party or parties.

In the other five agencies the procedure is for the trial examiner to conduct the hearing and prepare the order, which has the form of a tentative draft. The agency may then adopt it or change it. Thus it resembles the "recommended" decision of the Administrative Procedure Act. It differs, however, in that it is an intra-office memorandum, like the inspector's report in *Arlidge;* no private party is entitled to see it.

[20] Scott v. Callahan, 39 Wn.2d 801, 239 P.2d 333 (1951); Pierce v. Smith, 31 Wn.2d.52, 195 P.2d 112 (1948). It should be distinctly understood that the paragraph to which this note is appended, as its tenor indicates, does not necessarily reflect the opinion of any state officer and is unconnected with the reports made in the course of the survey.

[21] See Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595 (1920), which holds that a statute delegating legislative power may be valid although it does not require the agency to employ adjudication in making its rules. Even where a trial hearing is not required by constitution or statute, it has been found desirable for some functions, either in the interests of obtaining evidence in an orderly way, or because of the favorable impact on the regulated party in obtaining his acceptance of the regulatory program, or for other reasons. Some of the agencies in this study hold hearings though not required to do so.

However, at least two of these agencies are by law required to give personal consideration to the entire record. These two agencies, and two others, report that all of the members of the agency do in all cases read the record.[22] Some of the reports make it clear that what actually happens is that routine cases are instances of rubber-stamping the decision of the trial examiner, because the efficiency of the agency would suffer unnecessarily if its members spent their time reading the entire record in every case. When the agency does consider the entire record, the principle that he who decides must hear is in large measure satisfied. What the agency lacks then is extra-record information about the hearing such as demeanor evidence. A lawyer who has witnesses who make a poor appearance on the stand but talk well would find it difficult to object to this divided mode of trial. It could be called trial by deposition, in the manner of ancient equity practice, for it is the function of the trial examiner to be a deposition-taker.

The existence of a tentative draft or "intermediate report" modifies the foregoing picture somewhat. It is at once the source of a limited amount of information about what went on at the hearing, though not the equivalent of being at the hearing, and at the same time it is the source of some independently conceived views about what the conclusion ought to be. Insofar as this report is not made available to the parties, although they know who the trial examiner is, they do not know what part he plays in the decision-making process. None of these five agencies, and none of the other four who conduct their own hearings confessed to automatic acceptance of a staff member's views. On the other hand, all reported the use of advice, not only from the hearing officer, but in some instances from a member of the agency particularly assigned to study the case or from an assistant attorney general detailed to assist the agency, and in all nine agencies generally the help of the staff collectively was reported. Of course, it would be silly to point to

[22] What seems to be indicated for this segment of agency workload is a delegation, by agency rule in order to inform the public, of the authority to make an "initial" decision. If it is impossible to describe the class of routine cases in advance, or if it is desirable for moral effect to have the signatures of agency members on the order, the rule could provide in substance somewhat as follows: "In all cases set for hearing before a designated hearing officer under this rule, the findings, conclusions, and order of such officer will be approved by the board not less than twenty days after notice thereof to all parties to the hearing, unless the board shall have granted a reconsideration, either on exceptions to such order or on its own motion. If such reconsideration is granted, the board will consider the entire record or such parts thereof as are cited by an excepting party, and may set the matter down for oral argument." Statutes requiring personal consideration by the members of the agency would not, of course, authorize such delegations. However, it may be a better solution to recognize workload limitations in this way than merely to wink at statutory violations or to trust that they will be hard to prove.

the analogy of the jury room, where the bailiff is officially tongue-tied except under instructions from the judge. Moreover, law clerks to judges have their proper role,[23] and in the variety of decision-making vested in administrative agencies, there are many situations where many heads are better than one, just as legislation or business administration. Nevtrtheless, when a "judicialized" approach is appropriate and the private party has a reasonable expectation of knowing who his judge is and what the case adverse to him is, some safeguards are indicated.[24]

It is not the purpose of this study to propose reforms, or even to suggest that reforms in Washington administrative practice are needed.[25] No direct evidence has been found that among the agencies cooperating

[23] Compare CANON OF JUDICIAL ETHICS 17, *"Ex Parte Communications"*; and see Judge Jerome Frank, dissenting in La Touraine Coffee Co. v. Lorraine Coffee Co., 157 F.2d 115, 120 (2d Cir. 1946) *cert. denied*, 329 U.S. 771 (1946): "Seeking casually for a reference as to the meaning to Americans of Touraine, I find, on the bookshelf of a furnished house I am renting for the summer, a textbook . . . written by Miss Roth, an American high-school teacher, published . . . for instruction in French in American public high-schools." In the kind of sociological inquiry that may arise under the standard for testing the existence of confusion in trade name case, "litigation" evidence may not be as enlightening as knowledge derived from surveys, or "opinion polls" as they are sometimes called. Whether Miss Roth had knowledge of such quality about the usage of "Touraine" may be doubted, but the candor of the judge evokes a comparison with a provision of the Administrative Procedure Act, applicable in federal administrative adjudication: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." 60 STAT. 242 (1946), 5 U.S.C. § 1008 (d) (1952). Compare however the provisions exempting from the formal adjudication requirements "proceedings in which the decisions rest solely on inspections, tests, or elections," and the provision giving a licensee the right to an opportunity to "demonstrate" compliance with the law. *Id.* §§ 1006, 1010 (b).

[24] "But what would be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect." Morgan v. United States (Morgan II), 304 U.S. 1, 22 (1937). The prescription for notice of the intermediate report, opportunity to take exceptions and to propose findings and conclusions, contained in this opinion, is lifted almost verbatim into the Administrative Procedure Act. 60 STAT. 242 (1946), 5 U.S.C. § 1009 (1952). The Act also prohibits *ex parte* communications from any officers having prosecuting or investigative functions and prohibits, unless authorized by law, any *ex parte* communication by the hearing officer with any person concerning any fact in issue. These provisions outlawing the so-called institutional decision, are very narrowly applicable, however. They do not apply to hearings for the purpose of making rules, nor to adjudications of a wide variety, including for example those subject to re-trial in court and those dealing with the application of public utility rates. 60 STAT. 240 (1946), 5 U.S.C. § 1006 (c) (1952).

[25] The author has suggested elsewhere that the people of the state are left in the dark as to the law made by administrative agencies and their procedure. 28 WASH. L. REV. 193-194 (1953). The first order of reform would be to provide for a systematic, periodical publication of administrative rules and regulations. Then it should be possible to determine, in part at least, without the necessity of individual correspondence, whether there are problems that need to be dealt with and the extent to which uniformity of procedure is feasible.

in the inquiry their "clients" have been aggrieved by any feeling of mystery as to how the decision was deliberated within the agency. It is reasonable to conclude that these agencies are, within the limitations of their appropriations and personnel, according fair procedure in administrative adjudication as a general rule.

Perhaps it is pertinent to raise a few issues of general import. How far is administrative adjudication procedure necessary or advisable? If done right, it is more time-consuming, cumbersome, and expensive than the decision-making procedures of a czar, or even of a board of directors, or a general manager. On the other hand a "day in court," even if before an administrative tribunal, is a precious heritage and an intricately-evolved legal institution for the resolution of important issues of a particular kind. Assuming that there are compelling reasons for transferring adjudication from the courts to administrative agencies, what reasons could there be for providing a complete re-trial in court in addition to an administrative trial hearing? Assuming, further, that adjudication has been vested in an administrative agency, what considerations indicate a relaxation of judicial norms, such as that he who decides must hear? The use of trial examiners in administrative adjudication is typical.[26] The result is a two-level (or more) quasi-judiciary within each agency employing trial examiners, except that the transfer of the case from the trial to the appellate level may not be as well marked as are such transfers in the judiciary, by the requirement, for example, of a final order in the trial court. (On the other hand administrative appeals may be even more characterized by formality than judicial appeals. The Administrative Procedure Act tends in that direction.) When trial examiners are used, but the statute prescribes that the evidence shall have the personal consideration of the agency, the most efficient use of the examiners will militate against strict obedience to the statute, and the presumption of official regularity may have to work overtime. If this kind of official habit develops, legal morality suggests that the statute should be overhauled so as to permit the agency to do its work and at the same time accord a fair hearing. Furthermore, there are subject-matter areas where the advice of staff consultants, both in government and outside, should enter into an intelligent decision. The analogy of a medical clinic has been suggested, where specialization provides a maximum scope of effectiveness for the apti-

[26] See Rhyne, *"Can You Try An Administrative Agency Case as You Do a Case In Court?"* 40 A.B.A.J. 751 (1954).

tudes of each staff member.[27] The objective here is to keep responsibility fixed on an identified "line" officer who makes the decision, while affording appropriate opportunity to meet such opinions of the expert as are presented to the trier of the facts. The vesting of adjudication in administrative agencies should provide the occasion for devising more flexible procedural methods, but not the pretext for diluting the fairness of a trial hearing.

[27] DAVIS, ADMINISTRATIVE LAW 355 (1951).