Chapter 8

Right to a Fair Trial

1. General Tests of Fairness of Trial

THE granting of a fair trial is the one *sine qua non* of administrative procedure. It is the one fixed criterion of judicial review. Although the courts may decline to review an agency's findings of fact and in some cases at least its conclusions of law, there is always the opportunity for judicial review of the issue as to whether an administrative determination was made without giving an opportunity for full presentation of a party's case or without fair consideration of the just rights of the party.[1]

But provisions for judicial review are not an appropriate means for achieving and guaranteeing fairness in administration. Even if an agency were stripped of every vestige of judicial power, and its determinations thus removed from the ambit of judicial review, the problem of administrative fair play would remain substantially undiminished.[2]

The achievement of the goal is fundamentally a task committed to the agencies themselves. As the agencies attain the stability and poise of maturity, their attention is increasingly devoted to refining the procedural devices which they have worked out in their specific fields, adding safeguards wherever the need appears, to the end of assuring not only the effective enforcement of the social or economic policies whose implementation is entrusted to their care, but assuring also that fair consideration be given the individual rights of the

[1] Final Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 78; Hale, "Administrative Hearings under the Federal Constitution," 30 Ky. L. J. 137 (1942).

[2] Chester Lane, Address before the Association of American Law Schools, Handbook of Proceedings, 36th annual meeting (1938) 184, 199.

parties involved, to the end that adjudication be not only prompt but just.

The requirement of a fair trial is commonly associated with the hearing procedure itself. This association probably springs from the identification of hearing and trial in the common-law courts, where they constitute the essence of the adjudicatory process; and from the fact that the formal hearing constitutes the most dramatic step in administrative procedure. But because of deep-seated differences between judicial and administrative techniques, many of the requirements encompassed in the constitutional guaranty of a fair trial are to be applied, in administrative proceedings, to activities that either precede or follow the actual hearing. The question as to whether a fair trial has been granted cannot be answered by looking to the hearing procedure alone.

Thus, one of the three fundamental requisites of a fair trial—an opportunity to be fully informed of the nature of the charge in time to prepare to meet it—has only a collateral connection with the hearing procedure proper. The notice may, as above discussed, either precede or follow the hearing. Sometimes the hearing procedure itself is utilized as the means of giving this information to the respondent. But whatever device may be appropriate in the operations of a particular agency, as a means of informing the respondent of the nature of the agency's claim, this requirement has no direct connection with the hearing procedure itself. It is rather a part of the general problem of the adequacy of notice, discussed above.

A second basic requirement of a fair trial—that the one who decides must hear, i. e., that the actual decision must be that of the officer or board to whom the responsibility has been delegated by the legislature and who must reach that decision on the basis of a personal knowledge of the evidence—is likewise disassociated from the hearing proce-

dure proper. Contrary to normal judicial practice, where the initial decision is ordinarily that of the officer before whom the testimony is taken, the actual process of determination in administrative agencies is normally a posthearing procedure. The requirement is spoken of as part of the general guaranty of a fair trial because of the intimate association between hearing and decision in the courts, where indeed (as in jury trials) the decision is often the final step of the trial or hearing procedure. But in administrative proceedings, the process of determination is to a large extent divorced from the hearing procedure proper. This second requirement is therefore treated separately, *infra.*

The third general requirement of a fair trial—that the party on trial be granted an opportunity fully to present his contentions, by adducing testimony and arguing thereon before an unbiased tribunal—is the only aspect of this general guaranty which, in administrative procedure, is directly connected with the hearing itself. It is this particular portion of the general problem that is here discussed.

In addressing the problem as to what is and should be required of administrative tribunals as a means of safeguarding individual rights at the formal hearing, there is one fundamental to be borne in mind. The basic characteristics of trial procedure in the courts (which are largely a reflection of a particular Anglo-American historical development, influenced by many diverse factors, prominent among which has been the rather narrowly defined range of judicial activity) are not imposed on administrative tribunals,[3] which represent an outgrowth of conditions far different from those which influenced the course of the judicial procedures of the courts.[4] While the requirements imposed with respect

[3] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 60 S. Ct. 437 (1940).

[4] See Maitland, THE CONSTITUTIONAL HISTORY OF ENGLAND (1908) 415–418; Landis, THE ADMINISTRATIVE PROCESS, *passim.*

to hearings conducted by administrative agencies have been worked out with reference to judicial standards, yet the analogy is not to be taken in any technical sense. The fundamental principle is only that the rudimentary requirements of fair play be observed.[5] Lawyers who have objected long and bitterly to many aspects of customary court procedure, so far as its application in the courts is concerned, have had a tendency to enshrine this procedure as sacrosanct when administrative tribunals set out boldly on new and unfamiliar courses. But the courts see no immutable perfections in court-type procedure which administrative agencies must, at their peril, follow. Rather, the agencies are free to work out any type of hearing procedure which appears reasonably apt to the requirements of their particular task, subject only to the one requirement that the technique adopted must not violate the fundamental requirements of fair play and common decency. Little more is required than that the one who decides shall be bound in good conscience to consider the evidence, and to be guided essentially by what the evidence discloses, rather than by extraneous considerations which in other fields might control purely executive action.[6]

The reason for allowing wide departures from normal hearing procedures is said to be that such departures may make for brevity and speed. These ideals, however, are seldom realized. Records comprising several thousand pages are not unusual. Hearings before such bodies as the Federal Trade Commission are protracted not infrequently over a period of months if not years. Indeed, the Securities and Exchange Commission has found it desirable in one branch of its work to resort to the federal courts for the trial of

[5] Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 999 (1938). Among the many law review articles discussing the Morgan cases, the following are noteworthy: 27 GEO. L. J. 351 (1939); 47 YALE L. J. 647 (1938); 10 GEO. WASH. L. REV. 43 (1941); 30 KY. L. J. 408 (1942).

[6] Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936).

its cases, utilization of the administrative hearing having been found to be slower and more expensive.[7]

In cases where the reason for the rule is lacking, the rule should have but little application. In lengthy hearings on closely contested technical issues of fact and law, where the contentions of the opposing parties are presented by skilled attorneys, the cause of good administration is furthered by the adoption of customary judicial techniques in conducting the trial of cases. In other instances, as where a wounded veteran seeks disability benefits, or an aged applicant seeks an old-age allowance under the Social Security Act, or an unemployed worker seeks unemployment benefits, an atmosphere of sympathetic conversation is perhaps best conducive to proper administration. There, the rule that informal hearing procedures are proper, so long as the rudimentary requirements of fair play are observed, has just and fitting application. But the rule does not so well fit the case of proceedings before the Federal Trade Commission, state or federal utility commissions, the National Labor Relations Board, and other bodies before which experienced attorneys present evidence in heated controversies involving highly complex issues of law and fact. In such cases, formality is desirable, not only as a means of assuring dignity and decorum, but as the most effective means of assuring that the administrative officers presiding at the hearing shall not be misled by extraneous distractions.

Even in such cases, however, undesirable though it is, unrestrained informality does not void the administrative proceedings. The niceties of judicial procedure cannot be insisted upon. It is the responsibility of the agencies so to shape hearing techniques in these cases as to utilize the merits of the procedures that have developed in the courts.

[7] Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 61.

2. The Requirement of Impartiality

(a) *The general problem.* It is frequently said that the complete impartiality of the tribunal which hears and decides the case is one of the prerequisites of a fair trial. Indeed, it has been suggested that the requirement of an impartial tribunal, unconcerned with the result, applies with even greater rigidity to administrative officers than to judges; [8] and it has been said that an administrative body exercising quasi-judicial powers "must, from the very nature of its duties, act with entire impartiality"; [9] because "Judgment ceases to be judicial if there is condemnation in advance of trial." [10]

But this requirement of impartiality should not be taken as meaning that the administrative agency must be indifferent to the result. So far as constitutional requirements are concerned, an agency may approach a hearing with a strong hope that a record may be built up which will permit the agency to enter and enforce an order, the desirability of which is to the agency a matter of predetermined conviction.

This is the very core of the problem as to the practical connotations of the requirement of impartiality. In view of the frequent tendency of the agencies to make decisions on the basis of preformed opinions and prejudices, and the related tendency of many administrative officials to feel they are appointed to perform a mission and intentionally to direct their determinations accordingly,[11] the parties whose interests are adverse to those of the agency assail as prejudice an attitude of mind which on closer examination proves to be no

[8] National Labor Relations Board v. Phelps (C.C.A. 5th 1943), 136 F. (2d) 562.

[9] Humphrey's Ex'r v. United States, 295 U. S. 602, 624, 55 S. Ct. 869 (1935).

[10] Escoe v. Zerbst, 295 U. S. 490, 494, 55 S. Ct. 818 (1935); see also, Tumey v. Ohio, 273 U. S. 510, 47 S. Ct. 437 (1927); Jordan v. Commonwealth of Massachusetts, 225 U. S. 167, 32 S. Ct. 651 (1912).

[11] See instances cited in 1938 report of American Bar Association Committee on Administrative Tribunals, 63 A. B. A. REP. 331, 349.

more than a permissible interest in enforcing a legislatively declared policy.

This problem is inherent in the very nature of administrative tribunals. Charged as they are with responsibility for the advancement of a particular public policy, their desire to enforce that policy renders it difficult for them to appraise with impassive objectivity the evidence adduced at the hearing. Their special experience and conviction may lead them to find claims clearly established on a record which would leave a disinterested judge in doubt.[12] Ideally, the administrator should concern himself with his public duty to further broad statutory policies only when formulating regulations and general interpretative rulings, and should drop this attitude in favor of a strictly impartial, disinterested judicial approach in weighing the evidence presented at the hearing of a particular case.[13] But this idealism is rarely found. Administrative officers may strive for it,[14] but in practice it is not easy to lay aside the role of the legislator for that of the judge when walking from the committee room to the hearing room. The administrator is only a man. Often, he is a man without legal training, and the distinction between creating rules and applying them may not be so clear to him as to the counsel who argues before him. Or, for example, if the administrator sees that a cease and desist order would further the policy in which he is interested, he cannot easily perceive why, if a respondent's protestations of intent to comply with the law are sincere, the respondent should object to the entry of such an order. He sees but little point in respondent's protestations that the evidence pre-

[12] Jaffe, "Invective and Investigation in Administrative Law," 52 HARV. L. REV. 1201 (1939).

[13] Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 22. *Cf.*, Davis, "Bias of Administrative Officers," 32 MINN. L. REV. 199 (1948).

[14] See opinions in In Matter of Segal & Smith, 5 F. C. C. 3 (1937); In Matter of Express Pub. Co., 8 N. L. R. B. 162 (1938).

sented does not justify a finding of facts which the statute makes a condition precedent to the entry of the order.

Erroneous and unjust determinations too often result from this predilection of administrative agencies to determine cases and appraise facts in the light of predetermined policy motives. But the remedy lies rather with the agencies and the legislatures than with the courts. A significant step toward the amelioration of this condition would be a separation of the policy-making and fact-finding functions within the agencies. The individuals who make the rules and enforce them should not ordinarily be permitted to determine whether a violation of the rules has been proved. The decision on this question, preferably, should be left to individuals quite independent of the policy-making officials, so that the latter could not overrule the expert conclusions of the fact-finding officer in order to further executive policies or curry favor with the appropriating agencies at whose mercies the agency heads are often placed.[15]

In some cases, of course, although the hearing is judicial in form the decision is largely legislative in nature. This is often true where the agency instead of laying down broad rules in advance prefers to work out rules of policy a step at a time, by exercising its administrative or legislative discretion in deciding the result that should be reached in the various factual situations presented in a large number of cases. Here, the ideal of a disinterested appraisal of the evidence is even more difficult of achievement. In such cases, accepted concepts of administrative discretion permit decisions to be rooted in the agency's bias in favor of postulated ends. This must be accepted as part of the price to be paid for the advantages of administrative enforcement of the laws.

[15] Pound, ADMINISTRATIVE LAW (1942) 79. *Cf.*, provisions of Federal Administrative Procedure Act for appointment of trial examiners.

The fact that an agency's interest in implementing predetermined policies may dictate the result in particular cases—and dictate, in such cases, a different result than would be reached on the same facts by a judge who was completely disinterested in the result—does not constitute the type of bias and prejudice which invalidates an administrative determination. This exists, generally, only where the agency or a responsible official thereof has a personal or pecuniary interest in a particular case, or where there exists a personal prejudice against a particular respondent, or where the intemperate conduct of the hearing officer has made it impossible for a respondent fairly to present his case.

(b) *Personal or pecuniary interest.* Where a representative of an agency has a direct pecuniary interest in the outcome of a case pending before the agency, he is of course disqualified to participate in the decision of the case. Where his interest is indirect, the same principle applies, but considerations of *de minimis* may be invoked where a collateral interest is so unsubstantial that it is unlikely it would affect the decision. The situation is similar to that where a judge is a stockholder of a corporation involved in a lawsuit.[16] An interesting and typical situation was presented to the Supreme Court of Michigan,[17] in a case involving the fixing of milk prices by a board, four fifths of whose members were engaged in the business of producing or distributing milk. The order was protested by a distributor whose business methods differed from those of the distributors and producers represented on the board, and the court held that the statute creating the agency was fatally defective in failing to provide for a fair and impartial board. The facts of the case disclosing

[16] See 1 CYC. OF FEDERAL PROCEDURE (Perm. ed.) § 18.

[17] Milk Marketing Board v. Johnson, 295 Mich. 644, 295 N. W. 346 (1940), commented on in 89 U. PA. L. REV. 977 (1941).

a somewhat direct interest on the part of the board members, some of whom at least were in a sense business competitors of the petitioner, the result seems eminently fair and well calculated to preserve public respect for the work of administrative agencies. But it would not seem that the same result should follow necessarily in every case where the members of an agency are engaged in the same line of business as that falling within the jurisdiction of the agency. A manufacturer engaged in the aviation industry, for example, should not be deemed disqualified to act as a member of an agency charged with the responsibility for prescribing regulations governing the use of safety devices on airships.

(c) *Personal prejudice.* If an officer participating in the decision has a personal prejudice against a party appearing as a petitioner or respondent before the agency, the agency's action is void or at least voidable on proper petition by the party affected.[18] While the principle is clear, its application involves the same difficulties which plague the courts in cases involving recused judges.[19] In the first place, the existence of such personal prejudice is more easily asserted than proved. There is not ordinarily any statutory provision of the sort commonly found in judicature acts giving automatic effect to an affidavit alleging, in proper form, the existence of such personal prejudice (e. g., Section 7 (a) of the Federal Administrative Procedure Act of 1946 provides that upon the filing of such an affidavit, the agency shall determine the claim of disqualification as a part of the decision in the case). Claims of unfair trial based on the asserted prejudice of the

[18] Narragansett Racing Ass'n v. Kiernan, 59 R. I. 90, 194 Atl. 692 (1937); Clark v. Alcoholic Beverage Commission, 54 R. I. 126, 170 Atl. 79 (1934). See Scott, "Administrative Law: Bias of Trial Examiner and Due Process of Law," 30 GEO. L. J. 54 (1941); also, "The Disqualification of Administrative Officials," 41 COL. L. REV. 1384 (1941).

[19] See 41 HARV. L. REV. 78 (1927); Kramer "Judges—Appointment of Substitute for Recused Judges—Disqualification of Judges," 36 MICH. L. REV. 985 (1938); Godman, "Disqualification for Bias of Judicial and Administrative Officers," 23 N. Y. U. L. Q. REV. 109 (1948).

administrative officers frequently fail for lack of proof.[20] Secondly, and more important, there is involved here the difficulty above referred to of distinguishing between, on the one hand, those strong convictions of probable guilt, based on prior experience in situations involving a particular party or particular situations, which do not disqualify an administrator any more than they disqualify a trial judge; [21] and, on the other hand, a predisposition against a particular party founded on purely personal dislike or mistrust, which constitutes improper prejudice.

(d) *Interference with presentation of evidence.* The process of presenting evidence in hearings before administrative tribunals must be kept free from forces generating bias or intimidation.[22] At times an administrative officer, who though appointed by law is misguided by inexperience, so conducts himself at a hearing as to violate this wise precept. In some cases, which fortunately are comparatively few, a hearing officer adopts so partisan a manner and exhibits so obvious an attitude of bias as to interfere unfairly with the presentation of evidence, to the end that the record does not fairly reflect the true factual situation. Such interference may take the form of interrogating witnesses in a manner so hostile as to intimidate them, or interrupting the examination of a witness so frequently as to interfere with the orderly presentation of his testimony, or interfering unfairly with the cross-examination of witnesses, or exhibiting an abusive attitude toward witnesses or counsel or both, or sometimes, indeed, ordering the exclusion from the record of colloquies which show the general tone and character of the proceeding.

[20] Montana Power Co. v. Public Service Commission of Montana (D. C. Mont. 1935), 12 F. Supp. 946; Georgia Continental Tel. Co. v. Georgia Public Service Commission (D. C. Ga. 1934), 8 F. Supp. 434.

[21] See Craven v. United States (C.C.A. 1st 1927), 22 F. (2d) 605; Parker v. New England Oil Corp. (D. C. Mass. 1926), 13 F. (2d) 497; Johnson v. United States (D. C. Wash. 1929), 35 F. (2d) 355.

[22] National Labor Relations Board v. Indiana & M. Elec. Co., 318 U. S. 9, 63 S. Ct. 394 (1943).

Of course, if such conduct can be shown to have affected the result, the objection of bias and prejudice is well taken. But ordinarily, the effect cannot be precisely measured, nor can it be demonstrated that actual harm resulted. At best, there is an inference, tenuous or persuasive in the particular case, that the result might have been otherwise if the trial had been properly conducted. How far must the respondent go in establishing that he has been harmed? The prevailing view is that unless the inference of probable injury to the respondent is so strained as to be completely unimpressive, the burden is on the agency to show that posthearing procedures were effective to obliterate the effect of the injudicious conduct of the hearing officer.

In the court decisions reviewing such cases, the opinions reveal a variety of judicial utterances which may be misleading unless considered in view of all the facts of the case as presented to the court. Thus, it may be said that so long as the result reached was right, it is no grounds for voiding the administrative order that the hearing was improperly conducted, where the evidence amply supports the conclusion of the agency; [23] or on the other hand, it may be said that the existence of evidence in support of the agency's conclusions is immaterial, since, once partiality appears, it taints and vitiates all the proceedings.[24] The conflict between the decisions, however, is more seeming than real. Decisions supported by statements to the effect that once partiality appears, prejudice will be presumed,[25] are not really inconsistent with the decisions wherein statements are made that

[23] National Labor Relations Board v. Western Cartridge Co., Winchester Repeating Arms Co. Division (C.C.A. 2d 1943), 138 F. (2d) 551.

[24] National Labor Relations Board v. Phelps (C.C.A. 5th 1943), 136 F. (2d) 562.

[25] Inland Steel Co. v. National Labor Relations Board (C.C.A. 7th 1940), 109 F. (2d) 9.

material prejudice to the complaining litigant must clearly appear, before the court will set aside an administrative order because of the misconduct of the hearing officer.[26] Each decision is based on the peculiar facts of the case involved, and the kind and degree of the impropriety.[27] If the case against the respondent is a close one, and it appears that the agency made no effective effort to correct the hearing officer's misbehavior, justice may require the granting of a new hearing.[28] On the other hand, if it fairly appears that the respondent was able to get into the record enough evidence to establish fairly the defenses on which he relied, and if the agency was apparently able to decide the case uninfluenced by the behavior of the hearing officer, and if it quite clearly appears that the granting of a new trial would not affect the final result, the administrative order is allowed to stand, regardless of the harm done to the cause of good administration.

(e) *Where the only officers with power to act are prejudiced; doctrine of necessity.* Where an administrative agency, or a majority of the members thereof, is disqualified by reason of prejudice from proceeding to hear and determine a pending case, a situation sometimes ensues where an alleged lawbreaker must be permitted to escape standing trial unless the agency is allowed to proceed notwithstanding its bias. The great majority of decisions sustain the proposition that in such cases what has been called "the stern rule of necessity"

[26] National Labor Relations Board v. Ford Motor Co. (C.C.A. 6th 1940), 114 F. (2d) 905.

[27] Cupples Company Manufacturers v. National Labor Relations Board (Mutual Relations Ass'n) (C.C.A. 8th 1939), 106 F. (2d) 100; National Labor Relations Board v. Washington Dehydrated Food Co. (C.C.A. 9th 1941), 118 F. (2d) 980.

[28] Montgomery Ward & Co. v. National Labor Relations Board (Union of Ward Employees) (C.C.A. 8th 1939), 103 F. (2d) 147; and see National Labor Relations Board v. Western Cartridge Co., Winchester Repeating Arms Co. Division (C.C.A. 2d 1943), 138 F. (2d) 551.

requires the agency to act.[29] Inasmuch as the doctrine disqualifying a tribunal for prejudice is based on the mere likelihood of an erroneous determination, the result seems clearly proper. It does not necessarily follow that a biased tribunal will decide a case incorrectly. The officers will be presumed to make an honest effort to carry out their sworn obligation to decide the case fairly; and the reviewing court will be diligent to examine the record with particular care.

Of course, if there is anyone else who can act in the place of the disqualified persons, such substitution of personnel will be required. In such cases, the doctrine of necessity has no application.[30]

Since furtherance of the cause of good administration requires the avoidance of all appearances of unfairness, many agencies very properly strive to avoid reliance on this doctrine of necessity. While legislative authorization for substitution of *pro hac* board members temporarily to fill the places of the recused members would be required to eliminate the problem, much can be done even in the absence of statute by the appointing of a special panel or hearing officer to receive the evidence and make recommendations to the board members as to the proper disposition of the case. By utilizing such procedure in cases where the members of the board are prejudiced, it is possible to afford the respondent the opportunity of presenting his evidence and arguing his case before officers who do not share this prejudice. Their recommenda-

[29] Brinkley v. Hassig (C.C.A. 10th 1936), 83 F. (2d) 351; Loughran v. Federal Trade Commission (C.C.A. 8th 1944), 143 F. (2d) 431; Marquette Cement Mfg. Co. v. Federal Trade Commission (C.C.A. 7th 1945), 147 F. (2d) 589, aff'd *sub nom.* Federal Trade Commission v. Cement Institute, *et al.*, 333 U. S. 683, 68 S. Ct. 793 (1948); and see many cases collected in 39 A. L. R. 1476. A few cases reach a contrary result. Abrams v. Jones, 35 Idaho 532, 207 Pac. 724 (1922); State *ex rel.* Miller v. Aldridge, 212 Ala. 660, 103 So. 835 (1925). The problem is discussed in Fischer, "Should Prejudgment Before Hearing in a Quasi-Judicial Proceeding Disqualify an Administrative Agency?" 33 GEO. L. J. 311 (1945).

[30] Cases collected in 39 A. L. R. 1476.

tions to the board members who must decide would be unaffected by any improper interest, and by relying on such recommendations the members of the board can more easily overcome the effect of their personal prejudices in the matter.

3. Time, Place, and Manner of Holding the Hearing

(a) *Time.* Requirements as to the time of holding a hearing are ordinarily a subject for the rules of a particular agency. It is required, to be sure, that the respondent be given sufficient advance notice of the time of hearing in order to enable him properly to prepare his case. In practice, however, little difficulty arises on this score because of the general tendency of administrative agencies to hold hearings at intervals. If the respondent is not fully prepared to present his case when the hearing is called, the representatives of the agency will put in their proofs, and an adjournment will ordinarily be granted to enable the respondent to prepare his evidence. Refusal to grant a respondent a reasonable amount of time to prepare and present his case would undoubtedly constitute a deprival of a fair trial, vitiating the administrative proceedings. Section 5 of the Federal Administrative Act provides (as to cases where federal agencies are required by statute to hold hearings) that in fixing the time and place of hearing "due regard shall be had" for the convenience and necessity of the parties or their representatives.

(b) *Place of hearing.* Administrative tribunals are frequently ambulatory, holding the hearing at such place as will be most convenient for the majority of the witnesses and will afford most convenient access to the records which the agency desires to examine. Frequently, successive hearings are held in a single case at widely separated localities. Selection of the place of hearing and the removal of the

hearing from one place to another is within the prerogative of the agency, subject to the requirement that ample notice be given the parties affected as to the removal of the hearing from one place to another.[31]

While agencies have asserted an uncontrolled discretion as to the selection of the place where the hearing will be held, it would seem that they must be able to show at least a sound reason of administrative convenience to justify the holding of the hearing in a locality other than that where it would normally be held. If it appears that the selection of the place of the hearing was motivated by a desire to handicap the respondent, or to escape the process of a particular court, it may be held that deprival of a fair trial has resulted.[32] The power to hold hearings any place within the country is conferred not alone for the benefit of the agency but also for the convenience of those subject to the provisions of the statute which the agency administers; and in the case last cited it was held that fair play requires an agency to hold hearings at a place convenient to each of the parties.

(c) *Public v. private hearing.* It is difficult to conceive of a case where an agency's refusal to disclose to the public information obtained by an agency (either at a hearing or in the course of *ex parte* investigations) could be made the basis of a claim of deprival of the right to a fair trial. The only adverse effect of such a policy of making hearings private would be to deprive a collaterally interested party of an opportunity to learn the details of another party's case in which he might be interested; and this opportunity does not fall within the scope of the constitutional guaranty. If an agency wishes to conduct the hearing in private, it has the

[31] Wright v. Securities and Exchange Commission (C.C.A. 2d 1940), 112 F. (2d) 89.

[32] National Labor Relations Board v. Prettyman (C.C.A. 6th 1941), 117 F. (2d) 786.

privilege of so ordering, so long as the parties directly affected are afforded adequate opportunity to participate.

Normally, administrative hearings are public; and this is often required by statute. May insistence by the agency upon a public hearing deprive a respondent of a fair trial? In occasional cases, this result may obtain, as where the fair presentation of the respondent's case requires the disclosure of trade secrets or closely guarded secrets of business practices, and where the respondent could not afford to make public disclosure of such properly confidential matters. In such cases, it would seem to be the duty of the agency to protect the respondent's privilege of privacy by some method appropriate to the particular case.[33]

(d) *Representation by counsel.* The zealousness with which the courts in criminal cases have insisted upon protecting the right of defendants to be aided by counsel [34] is based upon a philosophy that by logical implication also requires administrative agencies to permit any party to be represented by counsel in a proceeding in which the agency passes upon judicial questions. Such proceedings have many of the qualities of criminal prosecutions, in that they typically involve a determination as to the truth of an allegation by the government that the respondent has violated the law of the land. While the Sixth Amendment is not applicable, its spirit is. As declared in broad language in *Powell v. Alabama*,[35] the right to a hearing "has always included the right to the aid of counsel. . . . If in any case, civil or criminal,

[33] *Cf.*, American Sumatra Tobacco Corp. v. Securities and Exchange Commission (App. D. C. 1937), 93 F. (2d) 236; E. Griffiths Hughes, Inc. v. Federal Trade Commission (App. D. C. 1933), 63 F. (2d) 362.

[34] E.g., Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019 (1938); Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363 (1945).

[35] 287 U. S. 45 at 68, 69, 53 S. Ct. 55 (1932). The quoted phrase is dictum. See Green, "The Bill of Rights, The Fourteenth Amendment, and The Supreme Court," 46 MICH. L. REV. 869 (1948) for a discussion of this general problem.

a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

The right to be heard by counsel has been recognized by the Department of Justice [36] as a necessary ingredient of a fair hearing in administrative proceedings, and is specifically provided for in Section 6 (a) of the Federal Administrative Procedure Act of 1946. Numerous decisions in state courts are to the same effect.[37]

But the right is no broader than the need requires.

Where, for example, it fairly appears that the party's failure to be represented by counsel was attributable to the party himself, or his attorney, rather than to the administrative tribunal, the agency may continue its hearings in the absence of counsel, even over the protest of respondent.[38]

Further, the right to representation by counsel does not apply to cases where the agency is not engaged in the determination of a judicial question, but is merely conducting an investigation or taking testimony to aid it in reaching a purely executive decision.[39]

In proceedings where elements of wide administrative or executive discretion are inextricably intertwined with the adjudication of justiciable rights, doubts should be resolved in favor of allowing representation by counsel. This, generally, is the result in the alienage cases, where the rule

[36] 33 Op. Atty. Gen. 17, 19 (1921).

[37] People *ex rel.* Mayor v. Nichols, 79 N. Y. 582 (1880); People *ex rel.* Rea v. Nokomis Coal Co., 308 Ill. 45, 139 N. E. 41 (1923); Christy v. City of Kingfisher, 13 Okla. 585, 76 Pac. 135 (1904).

[38] National Labor Relations Board v. American Potash & Chemical Corp. (C.C.A. 9th 1938), 98 F. (2d) 488; Manufacturers' Light & Heat Co. v. Ott (D. C. W. Va. 1914), 215 Fed. 940.

[39] Bowles v. Baer (C.C.A. 7th 1944), 142 F. (2d) 787; Avery v. Studley, 74 Conn. 272, 50 Atl. 752 (1901).

allowing counsel in deportation cases seems fairly well established,[40] although the decisions in this particular field exhibit a great contrariety of result, reflecting in large part the doubt as to the applicability of the constitutional guaranties to aliens "knocking at the door." [41]

(e) *Following agency rules.* Administrative agencies have no greater rights than do courts to depart from their accustomed procedural rules and practices, in order to facilitate the achievement of a desired result in a particular case. If such departure is shown to have prejudiced, or seems likely to have prejudiced, the rights of a party appearing before the agency, it will be held that such departure deprived the party of a fair trial and vitiated the administrative proceeding.

This general principle has many ramifications.

At one extreme, there are occasional cases where there is at least a suggestion or colorable inference that a change in an agency's rule was of a temporal nature, and adopted for the purpose of affecting the outcome of a particular case. The reprehensibility of such conduct needs no arguing and has been made a basis for setting aside administrative action.[42]

[40] Whitfield v. Hanges (C.C.A. 8th 1915), 222 Fed. 745; Low Wah Suey v. Backus, 225 U. S. 460, 32 S. Ct. 734 (1912).

[41] Brownlow v. Miers (C.C.A. 5th 1928), 28 F. (2d) 653. Among decisions insisting strongly on the right to counsel in this type of case are: Chew Hoy Quong v. White (C.C.A. 9th 1918), 249 Fed. 869; *Ex parte* Lam Pui (D. C. N. C. 1914), 217 Fed. 456; *Ex parte* Plastino (D. C. Wash. 1916), 236 Fed. 295; *Ex parte* Radivoeff (D. C. Mont. 1922), 278 Fed. 227. Other cases, permitting some restrictions on the right to representation by counsel in the preliminary stages of the administrative proceeding, include Chin Shee v. White (C.C.A. 9th 1921), 273 Fed. 801; Plane v. Carr (C.C.A. 9th 1927), 19 F. (2d) 470; United States *ex rel.* Buccino v. Williams (C. C. N. Y. 1911), 190 Fed. 897; United States *ex rel.* Ivanow v. Greenawalt (D. C. Pa. 1914), 213 Fed. 901; *Ex parte* Cahan aff'd *sub nom.* Cahan v. Carr (C.C.A. 9th 1931), 47 F. (2d) 604.

[42] Sibray v. United States (C.C.A. 3d 1922), 282 Fed. 795; Colyer v. Skeffington (D. C. Mass. 1920), 265 Fed. 17; Chamberlain, Dowling, and Hays, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942) 15.

At the opposite extreme, if it can be shown that the failure to observe the departmental regulation had no effect on the result, the administrative proceeding will not be invalidated.[43]

Between these two extremes lie the vast bulk of cases, where it is plain that the failure to follow the usual procedural devices caused a more or less substantial degree of inconvenience to the party appearing before the agency, but it is uncertain whether or not the irregularity affected the final result. The courts have been strongly inclined to resolve the doubt in favor of the party protesting the failure to follow the rules. Where the rules which were disregarded had been promulgated for the purpose of safeguarding the rights of the persons affected by administrative action, this result is of course to be expected.[44] In such cases, the departmental or agency rules may properly be considered as setting minimum standards of fair procedure, and any departure therefrom is not to be tolerated.

But the same result has been reached in other cases where the rule in question was apparently designed rather for the convenience of the agency than for the protection of the parties appearing before it.[45] In such cases, there is doubt whether the administrative proceedings should be invalidated unless prejudice is fairly indicated. But even where the nonobservance of administrative regulations is not, standing alone, of any seeming great significance, it may nevertheless be an important element giving color to a claim that other irregularities of procedure, when considered together with the

[43] United States *ex rel.* Minuto v. Reimer (C.C.A. 2d 1936), 83 F. (2d) 166.

[44] Mah Shee v. White (C.C.A. 9th 1917), 242 Fed. 868; *Ex parte* Radivoeff (D. C. Mont. 1922), 278 Fed. 227; United States *ex rel.* Ohm v. Perkins (C.C.A. 2d 1935), 79 F. (2d) 533; United States *ex rel.* Chin Fook Wah v. Dunton (D. C. N. Y. 1923), 288 Fed. 959.

[45] Erie R. Co. v. City of Paterson, 79 N. J. L. 512, 76 Atl. 1065 (1910).

departure from the agency's customary rules, had a combined or cumulative effect of depriving a party of a fair trial.[46]

4. Right to Meet the Agency's Case

One of the indispensable requisites of a fair hearing is that the course of the proceedings shall be such that the party appearing before the agency "shall have an opportunity to be heard and cross-examine the witnesses against him and shall have time and opportunity at a convenient place, after the evidence against him is produced and known to him, to produce evidence and witnesses to refute the charges." [47] The principle is plain; and in cases where the administrative determination rests fundamentally upon the testimony of witnesses taken at an open hearing, there is no difficulty in its application. But because administrative agencies so often base their findings and conclusions upon data otherwise obtained, the exact requirements of this rule are a source of perennial difficulty. Administrative bodies typically carry out many other functions in addition to their purely judicial duties; and in conducting their normal business they come into the possession of vast compilations of data which have some general bearing on a great number of cases and which they cannot intelligently disregard in the decision of any particular individual case. Sometimes the data represents the results of general fact-gathering activities; the agency has perhaps received reports from a group of persons or companies over a period of years, or it may have itself compiled official records which are a valuable source of information in specific cases. In other instances, and especially where the agency's function is that of enforcing a general legislative policy, or

[46] E.g., People *ex rel.* Cotton v. Leo, 194 App. Div. 921, 184 N. Y. S. 943 (1920).

[47] National Labor Relations Board v. Prettyman (C.C.A. 6th 1941), 117 F. (2d) 786, 790.

policing a particular industry or particular type of activity, the agency may employ a corps of investigators to gather facts concerning a particular case. Insofar as the agency's case against a respondent rests in part upon information derived from such sources, to what extent must the respondent be permitted to delve into the files of the agency, or seek to discredit the information therein contained? In general terms, it can be said that he must be granted an opportunity to learn what the agency relies on, to investigate and rebut (by oral cross-examination of witnesses or otherwise) the accuracy of the information so relied on, and to present all the evidentiary data in his possession which may call for a different conclusion or different inference from that suggested by the agency's information.

(a) *Right to examine opposing evidence.* The party appearing before an agency may insist that the agency advise him, by specific reference, of those parts of its general files and records on which it intends to rely in reaching a decision in the particular adversary proceeding with which he is concerned.[48] He does not have a right to delve and pry into all the records of the agency, or to examine secret reports of the agency's investigators, but all material upon which an agency proposes to rely as establishing a fact should be open for inspection.[49]

In enforcing this requirement, reliance must necessarily be placed on the integrity of the agencies. It is quite possible for an agency, should it so desire, to rely *sub silentio* on secret information, accurate or otherwise, which it does not disclose to the respondent. But to the extent that the agency's findings must be supported by the record of the proceedings before it, the agency is bound to introduce into the record at least

[48] United States and Interstate Commerce Commission v. Abilene & S. Ry. Co., 265 U. S. 274, 44 S. Ct. 565 (1924).

[49] United States *ex rel.* St. Louis Southwestern Ry. Co. v. Interstate Commerce Commission, 264 U. S. 64, 44 S. Ct. 294 (1924).

enough of its information to afford substantial support for its findings. More than this, the courts cannot require. In appraising the facts appearing in the record, an agency may be subconsciously influenced by a general background of information or belief which the respondent might be able to show to be inaccurate, but there is no practical way of giving the respondent an opportunity to essay this task. It must be hoped that the agency will desire the grounds of its tentative conclusions to be subjected to searching tests, and will thus make available for respondent's information all pertinent information.

(b) *Right to cross-examine opposing witnesses.* The right to cross-examine an opposing witness is a substantial part of the guaranty of a fair trial. There can be no doubt that where a witness is called to testify *vive voce,* the respondent must have an opportunity to cross-examine that witness. Nor can this right be defeated merely by permitting a witness to put his testimony in writing in advance of trial, and introducing his affidavit or report in lieu of calling him to the stand.

But on the other hand, the respondent has no right to insist that every bit of information on which the agency relies must be proved by oral testimony of a witness subject to cross-examination. Were the rule pushed so far, it would obviously collide with the principle that enables agencies to receive hearsay proof, and would in fact make it practically impossible for most agencies to conduct their business.

It is at this point that the difference between courts and administrative agencies in respect to fact-finding techniques produces a real difficulty in setting standards to determine when a party's right to a fair trial has been infringed.[50] The general theory is clear—the agency is not to be permitted to accept as evidence anything which is devoid of evidential

[50] *Cf.*, Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 196, 198; and Gellhorn, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941) 100, 111.

value, and the party concerned must be given a fair opportunity to demonstrate the unreliability of the proffered proof.[51] In some cases, the only adequate way to undertake such a demonstration is by oral cross-examination of the party who is the author of the statement, but in others, an opportunity to rebut the accuracy of the statement, or demonstrate that it does not rest on reliable sources of information, is sufficient. The general test is well phrased in Section 7 (c) of the Federal Administrative Procedure Act of 1946, providing (in case of certain proceedings before federal agencies) a right "to conduct such cross-examination as may be required for a full and true disclosure of the facts." A great deal depends on the court's judgment as to what constitutes, in the circumstances of a particular case, a reasonable substitute or equivalent for the typical judicial cross-examination procedure; and it is not unnatural that courts exhibit some differences of opinion in specific case situations.

But several general propositions may reasonably and safely be accepted. If a letter, affidavit, or other written report is offered as a substitute for the oral testimony of an individual witness as to what he has seen, or believes, or concludes, the other party (at least if the contents of the writing are of any importance) must be given an opportunity to cross-examine the author.[52]

Similarly, where the only means of attacking the accuracy of the proffered evidence is by cross-examination of the author, that opportunity must be afforded.[53]

Again, where the credibility of the author is in issue, the opportunity for cross-examination must be afforded.

[51] Pacific Livestock Co. v. State Water Board of Oregon, 241 U. S. 440, 36 S. Ct. 637 (1916).

[52] Bereda Mfg. Co. v. Industrial Board of Illinois, 275 Ill. 514, 114 N. E. 275 (1916).

[53] United States v. Baltimore & O. Southwestern R. Co., 226 U. S. 14, 33 S. Ct. 5 (1912).

Where the testimony relates to a specific factual dispute at issue in a particular case, cross-examination is more generally insisted upon than in cases where the testimony relates to matters of general information.

But on the other hand, where an agency desires to rely on information gathered in the course of a general investigation, or on data revealed by hundreds of reports filed by disinterested parties, the rights intended to be guaranteed by the privilege of cross-examination can ordinarily be safeguarded so long as the affected party is given full opportunity to rebut the prima-facie showing made by the reports. The impracticability of calling a large number of witnesses for cross-examination as to a variety of issues related only collaterally to the specific question before the agency, coupled with the apparent unlikelihood that such cross-examination would affect the statements or reports in question, make it unwise to insist upon a literal application of the general right of cross-examination.

The apparent reliability of the hearsay received without privilege of cross-examination and the weight attached to it by the agency, are both important factors. Sometimes, there is little real controversy as to the factual question involved; in such cases, deprival of the right of cross-examination is likely to be deemed unimportant. And if the administrative decision can be supported by reliance on other evidence, as to which there was afforded an opportunity for cross-examination, the denial of cross-examination is harmless.

Generally, the respondent must be accorded an opportunity to cross-examine the authors of the information on which the agency relies, except in cases where the nature of the statement is such that its asserted unreliability can be just as well demonstrated by rebutting proofs as by actual cross-examination.

In cases where the agency's function is legislative or executive rather than judicial, of course, the right to cross-examination does not exist.[54]

The question as to how far the right of cross-examination may be abridged without denying a fair trial is intimately related to the question as to the extent to which agencies may rely on official notice of facts not proved, a question which is discussed more fully, *infra*.

(c) *The right to introduce evidence.* The right to a full hearing implies the privilege of introducing all evidence which is competent, material, and relevant to the issues.[55] Exclusion of evidence which should have been received and considered may be a fatal error.[56] However, a party complaining of the exclusion of proffered evidence must exhaust every remedy to get the matter before the tribunal, if he is to rely on this ground as an attack upon an administrative determination. If, for example, the governing statute makes available the device of petitioning the appellate court for an order granting leave to adduce the additional evidence before the agency, he must resort to this device; and his failure to make such an effort estops him from raising the point.[57]

5. Timeliness of Hearing; Rehearing

Administrative adjudication ordinarily differs from the typical court decision in that it is not directed principally to a determination of rights and liabilities arising out of a closed

[54] Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 53 S. Ct. 350 (1933).

[55] Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816 (1937); Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 93, 33 S. Ct. 185 (1913); State of Washington *ex rel.* Oregon Railroad and Navigation Co. v. Fairchild, 224 U. S. 510, 32 S. Ct. 535 (1912); West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U. S. 63, 55 S. Ct. 316 (1935); and see § 7 (c) of the Federal Administrative Procedure Act of 1946.

[56] Chicago, M. & St. P. Ry. Co. v. Public Utilities Commission of State of Idaho, 274 U. S. 344, 47 S. Ct. 604 (1927); West Ohio Gas Co. v. Public Utilities Commission of Ohio, 294 U. S. 63, 55 S. Ct. 316 (1935).

[57] Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938).

situation, but rather is chiefly significant as a mandate to govern a continuing course of action. Any material changes in the factual situation that may occur between the time of the hearing and the time when the order is drafted should be made known to the agency, so that it may fashion its remedy to fit the current situation.

The problem arises frequently because of the lapse of time which occurs between the date of the hearing and the date when the order is prepared. After the testimony has been completed, the trial examiner writes his report, copies of this document are sent to the parties, they file exceptions thereto, and there is an argument on these exceptions before the agency. Such, at least, is the typical course of procedure in many tribunals. But this process, especially in cases where the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful, often consumes a half year or more; and (such being the nature of human activities in many of the fields committed to the supervision of administrative agencies) during these six months there often occur significant changes in the factual situation.

If the case is set down for a new hearing before a trial examiner, the whole process is put into operation a second time; and by the time the case again reaches the agency heads, there may have been further changes in the factual situation.

In order to permit the eventual completion of the administrative process, it is necessary for the agency heads either to hear the new evidence personally, or to cut the matter short by deciding the case without reference to the recent changes in the factual situation.

The choice between these two alternatives is that of the agency. Its discretion in the matter will not ordinarily be reviewed by the courts.[58] In making the choice, the agency must consider: the apparent importance of the new facts (there

[58] Interstate Commerce Commission v. City of Jersey City, 322 U. S. 503, 64 S. Ct. 1129 (1944).

may be but little indication that they would affect the result); the need for speedy action; and the likelihood that the plea for a rehearing is premised principally on the hope of stalling enforcement of the administrative order. In some cases, a rehearing before a trial examiner or before the agency heads themselves may appear to be justified, but in other cases, justification does not appear. Denial of a rehearing cannot, except in an extraordinary case of clear abuse of discretion, be considered a deprival of a fair trial.[59]

In some cases, however, abuse of discretion has been established, as where the petition for a rehearing showed persuasively that economic conditions had so altered since the close of the prior hearing (two and a half years before) that the administrative record was irresponsive to present conditions and so could not be made a proper basis for administrative application of the statutory mandate.[60]

6. The Hearing Officer

The right to a fair trial does not include the privilege of insisting that the hearing be conducted before the members of the agency who are to make the decision in the case. The obvious practical necessity of delegating to hearing officers the duty of taking the evidence has long been recognized and uniformly upheld.[61] Employment of examiners to preside over the hearing at which will be made the record for subsequent decision by administrative officials and review by the courts, is almost the universal practice, although Section 5 of

[59] Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 54 S. Ct. 692 (1934); United States v. Northern Pac. R. Co., 288 U. S. 490, 53 S. Ct. 406 (1933); Acker v. United States, 298 U. S. 426, 56 S. Ct. 824 (1936).

[60] Atchison, T. & S. F. R. Co. v. United States, 284 U. S. 248, 52 S. Ct. 146 (1932).

[61] E.g., Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906 (1936); Quon Quon Poy v. Johnson, 273 U. S. 352, 47 S. Ct. 346 (1927); Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816 (1937); California Lumbermen's Council v. Federal Trade Commission (C.C.A. 9th 1940), 115 F. (2d) 178.

the Administrative Procedure Act of 1946 provides that, where federal agencies are required by statute to hold hearings, the hearing officer shall make the initial or recommended decision.

The actual conduct of the hearing—its fairness and adequacy—is thus committed to the hands of the hearing officer. It is important that this official shall command public confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it.[62] He should have the status, responsibility, and powers of a trial judge. But normally his position is far different. Frequently, the hearing officer is no more than a monitor, without effective power even to keep order at the hearing or to supervise the recording of the evidence, his position in some instances being shockingly similar to that of a notary public before whom a deposition is taken. In most agencies, he does have some powers to rule on questions arising in connection with the hearing and has the responsibility of preparing tentative findings (the weight of which varies in different agencies) or of recommending the decision in the case. Occasionally, wide powers are vested in the hearing officer—and the trend of development is increasingly in this direction (see Section 7 of the Federal Administrative Procedure Act of 1946)—but on the whole his position has been ministerial in nature.

The insignificant position of the hearing officer has resulted in the paradox that the conduct of the official who should be primarily responsible for the fairness of the hearing is ordinarily held to have but little effect in determining whether a fair trial has been accorded. Unless his conduct is such as to intimidate witnesses or to make it impossible for one of the parties to get his evidence into the record, the assumption of an unfair attitude on his part, it is reasoned, does

[62] Report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 43.

not result in the deprival of a fair trial, because his attitude will not contaminate the review of the record and the making of the decision by the responsible officers of the agency. But as the reason for the rule disappears, the rule itself will undoubtedly be modified. As greater powers and more substantial responsibilities are vested in the hearing officers, unjudicial conduct on their part will come more and more to be regarded as a deprival of the right of a fair trial.

The responsibility of the agencies to further the cause of good administration, furthermore, requires insistence that the hearing officer approach the hearing with an open mind, without bias and without prejudgment of the issues, and without any fear that his chances for promotion in the agency may be affected by his recommendations (see Section 5 (c) of the Federal Administrative Procedure Act of 1946). His chief purpose should be to afford to each party an adequate opportunity to present his case and to meet the case against him. This is required not only in the interests of fairness but in the interests of assuring a proper basis for informed and correct administrative action.[63]

The hearing officer, like a trial judge, should participate sparingly in the examination of witnesses, except where such participation is necessary to a full development of the significant facts.

He should see to it that the record of the hearing is clear and meaningful. The informality of administrative hearings, and unskillful employment of the device of going "off the record," [64] frequently results in the production of transcripts that are almost unreadable and of limited helpfulness either to the responsible heads of the agencies or to reviewing courts.

[63] Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 108.

[64] Benjamin, *op. cit.*, 140.

In order that he properly execute these responsibilities, it is obviously necessary that the hearing officer be an individual who is trained in the law and who has had an ample background of instructive experience. The fact that this is not in practice required [65] has much to do with the current need for general improvement in this aspect of administrative practice.

If the initial decision of the hearing officer can carry the hallmark of fairness and ability, a great part of the criticism directed against the hearing procedures of administrative agencies will have been met. The recommendations of the Attorney General's Committee [66] indicate the direction which future development will take. To assure the fairness and efficiency of the hearing procedure, the hearing officer must be an official who is fully trained in law, in administration, and in the particular field in which the agency operates. The position must carry substantial compensation—sufficient to attract very able men. It must carry also full power to direct the conduct of the hearing, and to make decisions which will be accorded, within the agency, the status which in the judicial system is possessed by the decision of the trial judge. Finally, the position should carry the security of tenure and freedom from political pressure which is necessary to guarantee the impartiality and dignity of any judicial officer. Great progress toward this end is made by Section 11 of the Federal Administrative Procedure Act of 1946.

[65] As to the training and experience of the hearing officers of many federal agencies, see report of Attorney General's Committee, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 375.

[66] *Idem.* 45.