Chapter 10

Official Notice

1. In General

ONE of the principal reasons for entrusting to administrative tribunals the determination of specialized classes of justiciable controversies is the belief that through their extensive experience in a particular field they gain information, knowledge, and wisdom which enable them to decide cases of a highly technical or specialized nature more wisely than could a court of general jurisdiction. Limitations on their power to utilize the breadth of knowledge gained through intensive experience in their particular fields, therefore, can be imposed only at the cost of reducing proportionately one of the prime benefits sought through the creation of such tribunals. But some limitations are nonetheless necessary, in the interests of assuring fair and just determinations, for the simple reason that without them there would be no means of correcting an administrative determination which was erroneous because the agency's experience had convinced it of certain conclusions which could be shown to an impartial tribunal to be without foundation. To the extent that an agency is permitted to notice officially the existence of alleged facts, its conclusions with respect thereto (whether or not supported by any evidence) become final and unassailable. Determinations may thus be based not on the evidence produced at the hearing, but on conclusions reached dehors the record. The hearing can accordingly be reduced to a mere talisman. But such reduction, of course, cannot be permitted in cases where hearings are required. And so the courts have been compelled to work out methods whereby the special experience and knowledge of adminis-

trative tribunals can be fully utilized under conditions which will safeguard the right of the parties to contest the accuracy and correctness of the conclusions which the tribunal's experience has taught it to believe.

This is the general problem of "official notice." So stated, it involves a variety of related but separable inquiries, which may be reduced to clearer focus by narrowing the general definition to exclude the related subsidiary questions.

2. Use of Expert Knowledge in Drawing Inferences

In the process of decision, as distinguished from the process of proof, agency officials are at liberty to give the fullest play to their expert knowledge and experience in evaluating the evidence that is in the record and drawing conclusions therefrom. Such utilization is not only permissible, but is desirable.[1] This, of course, is quite a different thing than the utilization of special experience and asserted knowledge as a substitute for evidence and as a basis for making factual determinations as to matters not proved by evidence in the record.

The difference is one of degree rather than of kind, to be sure. If a certain conclusion has become firmly fixed in the administrator's mind, he will find it easy to discredit evidence tending to support a contrary conclusion and will, on the other hand, be easily persuaded to make inferences consonant with his prepossessed ideas, and this on the basis of evidence which to another would not seem to justify any such inference. But so long as the factual conclusion must be supportable by evidence in the record, and cannot be premised upon the asserted independent knowledge of the agency, the tendency of the agencies to rely heavily on their special experience (and the predilections induced thereby) in

[1] Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 209, 210; Report of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 71.

drawing inferences from the evidence, does not present any insurmountable problems. The court may set the conclusion aside unless it appears that the inference so drawn can reasonably be premised upon the record evidence. By and large, this is a sufficient protection against the danger that asserted expertness may become a euphemistic label concealing actual arbitrary decision. Any further safeguards would interfere with the fullest utilization of the admitted expertness which agencies acquire.

Closely related to the problems posed by the tendency of agencies to rely on their special information and experience in evaluating and drawing inferences from the evidence before them, is the question arising out of an agency's refusal (induced by its special experience) to accept as true the uncontradicted evidence of witnesses testifying in support of a given conclusion.

Where the burden is on the party appearing before the agency to convince it of a certain conclusion, there is no reason why an agency should not have at least as much power as that of a common-law jury to refuse to accept testimony which its experience shows to be incredible. The need of such a power is particularly great in the case of administrative agencies, because so often the testimony offered is opinion evidence—the ideas of experts as to the value of property, the cause of a hernia, the safety of a mechanical device, and the like. Hearings before administrative agencies frequently involve a situation where a board of experts is called upon to pass judgment upon the opinions of other experts representing the parties. Quite properly, the agency is usually held to have the power to refuse to accept the opinions of the experts who testify.

A typical case is that where, in a claim for workmen's compensation, the issue is whether a hernia is traumatic. Claimant's doctors give their opinion that it was. There is

no direct contradictory evidence, but the Board is convinced that the physicians' opinion is so at odds with the physical facts of the case as to be incredible. The Board may disbelieve the expert witness.[2]

Similarly, where an agency is called upon to fix a valuation on property, it may rely on its own knowledge as to values in refusing to accept an expert's estimate, even though because of the *ex parte* nature of many valuation proceedings there is no directly contrary evidence before the agency.[3] In this case again, the problem involved is different than that of an agency's officially noticing facts as to which there is no evidence; for in many instances there is no requirement in assessment proceedings that the agency's determination be supported by substantial evidence. In cases where this requirement does exist, it is of course held that the agency may not arbitrarily substitute a different value than that indicated by the testimony.[4]

3. Notice of "Litigation" Facts

The principle of official notice is based on the premise that administrative tribunals should be permitted to utilize their special information and knowledge built up over many years of intensive study of a specialized field, and not be required to treat each case as an isolated phenomenon in the consideration of which their accumulated knowledge must be excluded. This premise does not apply to a case where an agency may be inclined to rely on *ex parte* reports of investigators as to particular factual details peculiar to a given case. Information

[2] McCarthy v. Industrial Commission of Wisconsin, 194 Wis. 198, 215 N. W. 824 (1927). See Pillsbury, "Review of Decisions of Administrative Tribunals—Industrial Accident Commission," 19 CAL. L. REV. 282 (1931).

[3] Uncasville Mfg. Co. v. Commissioner of Internal Revenue (C.C.A. 2d 1932), 55 F. (2d) 893; Gloyd v. Commissioner of Internal Revenue (C.C.A. 8th 1933), 63 F. (2d) 649.

[4] Boggs & Buhl, Inc. v. Commissioner of Internal Revenue (C.C.A. 3d 1929), 34 F. (2d) 859; Bonwit Teller & Co. v. Commissioner of Internal Revenue (C.C.A. 2d 1931), 53 F. (2d) 381.

gathered privately by an agency with reference solely to a particular case at hand, does not bear the hallmark of expert knowledge. It is rather to be compared, from the standpoint of reliability, with the report of a private detective agency. There is no reason to permit an agency to rely on such reports as a basis for decision. Rather, there is every reason to insist that such reports should be subjected to the searching light of cross-examination. Such information should be adduced only by the ordinary process of proof, and should be considered only if it is in the record and if there has been adequate opportunity to examine the ability and credibility of the investigator.

It is only when the information in question has been developed over a period of years in the usual course of the business of the agency, and has emerged from a coterie of facts established indisputably in numerous cases, that there is a basis for permitting an agency to utilize its knowledge in noticing facts, even though not all the sources thereof are reproduced in full detail in the record. It is only where truly expert knowledge is involved that the doctrine of official notice applies. Asserted testimonial knowledge based on private investigations as to the particular facts in litigation in an individual case is not expert knowledge. The doctrine of official notice does not permit an agency to rely on it.

Here again, just as in the case of the distinction between utilization of expert knowledge as a substitute for evidence and the utilization thereof as a basis for evaluating evidence, the difference is only a matter of degree. A report by an expert accountant employed by an agency, for example, may inextricably intertwine matters representing the accumulated expert knowledge of the agency with other matters representing an opinion as to the "litigation" facts of a particular case. It is the responsibility of the agency to refuse to give undue weight to the latter aspects of the report, for there

is usually no way of proving that the agency has relied unduly on the results of its *ex parte* investigation into the "litigation" facts.

4. Use of Record in Another Proceeding

Not infrequently, administrative agencies incorporate into the record of a particular proceeding, either by introduction of bulky exhibits or by reference to the agency's files and records, a transcript of the proceedings in another case. The agency thus relies on what it heard and what it concluded in another case, as a basis for its decision in the instant case. But here again, there is really no problem of official notice involved, for it is open to the parties to examine the files of the cases referred to and to meet by their own proofs whatever adverse factual data such files may contain.

Reliance upon the records made in other cases, specifically referred to, involves primarily the question as to whether the party appearing before the agency has been unfairly deprived of the right to cross-examine the witnesses who testified in the other proceeding. Ordinarily, in accordance with the principles discussed *supra*, opportunity to rebut the testimony offered in the prior proceeding is deemed to be a satisfactory substitute for the actual cross-examination of the witnesses therein.[5]

It is only where the agency relies on its records in other proceedings as a basis for reaching a conclusion in a particular

[5] Lakemore Co. v. Brown (Emergency Ct. of App. 1943), 137 F. (2d) 355. In immigration cases, the courts have been noticeably liberal in permitting utilization of records in other proceedings; e. g., Jung See v. Nash (C.C.A. 8th 1925), 4 F. (2d) 639; Lui Tse Chew v. Nagle (C.C.A. 9th 1926), 15 F. (2d) 636; Soo Hoo Yen *ex rel.* Soo Hoo Do Yim v. Tillinghast (C.C.A. 1st 1928), 24 F. (2d) 163; Yong Yung See v. United States (C.C.A. 9th 1937), 92 F. (2d) 700. In Interstate Commerce Commission cases, less liberality is permitted, e. g., Louisville & N. R. Co. v. United States (D. C. Ky. 1915), 225 Fed. 571, aff'd 245 U. S. 463, 38 S. Ct. 141 (1918). The general problem is discussed by J. F. Davison in 25 IA. L. REV. 555 (1940).

case, without giving the parties adequate notice of the records so to be relied on, and an adequate opportunity to examine and rebut them, that a problem of official notice is involved.

5. Where Agency Is Not Exercising Judicial Function

Since the problem of official notice is concerned fundamentally with the extent to which an agency may substitute its own knowledge or conclusions for evidence, it is clear that the problem cannot arise in cases where there is no requirement that the agency act on the basis of evidence. Where an agency exercises legislative or executive functions, it is not ordinarily required to show any basis of substantial evidence to support its findings and conclusions (except where a statute imposes such a requirement) and therefore in making findings it may rely as fully on its own experience as on any other factor. It could be said that in such cases there is no limit to what an agency may officially notice. More accurately, it should be concluded that the doctrine of official notice is not involved where an agency exercises executive or legislative functions.

Thus, in cases where no hearing need be given, the agency is at liberty to determine the case without reference to the testimony adduced at any hearing which may be held; and the doctrine limiting the extent to which an agency may officially notice facts is inapplicable.

Similarly, in cases where there is no judicial review of the factual findings (as in many *ad valorem* tax-assessment cases, where ordinarily the assessors are not required to support their judgment of values by a formal record containing substantial evidence tending to establish the accuracy of the assessment) the doctrine of official notice is really inapplicable.[6]

[6] Chicago, B. & Q. R. Co. v. Babcock, 204 U. S. 585, 27 S. Ct. 326 (1907); Olympia Water Works v. Gelbach, 16 Wash. 482, 48 Pac. 251 (1897).

6. Official Notice Redefined

The real crux of the problem, then, after all the subsidiary inquiries are put to one side, is simply this: To what extent may an administrative tribunal, in the exercise of its judicial functions, rely on conclusions developed as a result of its intensive experience in its specialized field of activity, as a basis for factual findings as to matters of a general nature which are not fully established by evidence in the record made in a particular case?

7. When Notice Freely Permitted

The rule is now clearly emerging (see, e. g., Section 7 (d) of the Federal Administrative Procedure Act of 1946) that an administrative agency may take official notice not only of such factual matters as courts judicially notice,[7] but also of any factual matter of a general nature which its experience has shown to be true, subject always to the proviso that the parties must be given adequate advance notice of the facts which the agency proposes to note, and given adequate opportunity to show the inaccuracy of the facts or the fallacy of the conclusions which the agency proposes tentatively to accept without proof. Such official notice, therefore, has only *prima-facie* effect. The agency is permitted to announce any reasonable presumption it proposes to make as to factual matters of a general nature within the field of its special knowledge, but the presumption may be substituted for evidence only so long as it is not rebutted. Often, the party against whom the notice is asserted will seek to show not

[7] This is commonly said to be restricted to matters of common knowledge and notoriety. But the courts have been exceedingly liberal in their interpretation of what constitutes common knowledge; and have in fact been willing to notice a wide variety of facts which are deemed to be readily susceptible to objective ascertainment, noticing such facts as the height of the tallest man in history; that dynamic radio completely superseded the magnetic; that pneumatic tires are more damaging to highways than hard rubber tires. See E. D. Ransom, comment, 36 MICH. L. REV. 610 (1938).

that the general fact of which the commission proposes to take notice is entirely wrong, but only that the generality should be somehow modified because of conditions present in his particular case. Often, the area of disagreement concerns only the significance of the facts to be noticed, and the deductions to be drawn from them.

So long as adequate notice is given, at the hearing or prior thereto, of what generalities the agency proposes to notice, and so long as the parties have adequate opportunity to meet and rebut the inference which the agency proposes to make, wide latitude should be given. For example, if the issuance of a license to operate a common or contract carrier depends on whether or not public convenience requires such service between two cities, the commission should be able to rely on conclusions reached in a recent hearing on a similar application as to the same route, and should not be required to put into the record again all the information it had heard a few weeks previously.[8]

But if the agency fails to advise the parties as to the assumed facts which it proposes to notice, or fails to give the parties adequate opportunity to examine their accuracy and rebut or explain them, there has been a denial of due process.[9]

Thus, there are two limitations imposed on the power of administrative agencies to notice officially as facts certain generalities which their special experience has taught them to believe. They are: (1) the facts noticed must be incorporated into the record, or there must be citation of the source ma-

[8] Railroad Commission v. McDonald (Tex. Civ. App. 1936), 90 S. W. (2d) 581; Pennsylvania R. Co. v. United States (D. C. Pa. 1930), 40 F. (2d) 921; Gellhorn, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941) 89–92.

[9] Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 57 S. Ct. 724 (1937); United States and Interstate Commerce Commission v. Abilene & Southern Ry. Co., 265 U. S. 274, 44 S. Ct. 565 (1924); West Ohio Gas Co. v. Public Utilities Commission of Ohio (D. C. Ohio 1928), 42 F. (2d) 899. See Smith, "Practice and Procedure Before the Interstate Commerce Commission," 5 GEO. WASH. L. REV. 404 (1937).

terial on which the agency relies; and (2) this source material must be made available to the parties for their examination.[10]

8. Relaxation of Requirements Where Risk of Error Is Slight

Ordinarily, disregard of either of the two last-mentioned requirements is fatal to the validity of the administrative determination, but in cases where the risk of error seems plainly small, some relaxation of the requirements is permitted. Thus, agencies have been permitted to notice such matters as the average earnings of a day laborer,[11] or an individual's earning capacity.[12] For somewhat similar reasons, notice is freely permitted in alienage cases.[13] Where an agency notices a party's own prior reports, no reversible error exists, at least in the absence of a showing of actual prejudice.[14]

Some state courts have suggested that public utility commissions have almost unlimited powers to notice officially anything in their files, and rely on any report contained therein, without notice to the parties.[15] But to the extent that such decisions appear to permit a broader scope to the exercise of official notice than do the Supreme Court cases above cited, it would seem clear (in view of the constitutional basis of the federal decisions in the guaranties of the Fifth Amendment and the Fourteenth Amendment) that they cannot be regarded as authoritative. Further, examination of many of

[10] The following law review articles discuss this general problem: Gellhorn, "Official Notice in Administrative Adjudication," 20 TEX. L. REV. 131 (1941); Faris, "Judicial Notice by Administrative Bodies," 4 IND. L. J. 167 (1928); Merrill, "Rules of Evidence in Administrative Proceedings," 14 OKLA. BAR A. J. 1934 (1943).

[11] Walsh's Case, 227 Mass. 341, 116 N. E. 496 (1917).

[12] O'Reilly's Case, 265 Mass. 456, 164 N. E. 440 (1929).

[13] E. g., Jung See v. Nash (C.C.A. 8th, 1925), 4 F. (2d) 639.

[14] Market Street Railway Co. v. Railroad Commission of California, 324 U. S. 548, 65 S. Ct. 770 (1945), commented on in 60 HARV. L. REV. 620 (1947).

[15] Chicago & N. W. Ry. Co. v. Railroad Commission of Wisconsin, 156 Wis. 47, 145 N. W. 216, 974 (1914); City of Elizabeth v. Board of Public Utility Commissioners, 99 N. J. L. 496, 123 Atl. 358 (1924).

the decisions containing such broad remarks as to the powers of agencies to take official notice of facts not incorporated in the record indicates that the requirements of the rule as above stated had been satisfied, the parties having in fact been given adequate opportunity to learn what facts a commission proposed to notice and adequate opportunity to rebut them.[16]

[16] E. g., Duluth Street Railway Co. v. Railroad Commission, 161 Wis. 245, 152 N. W. 887 (1915); Steamboat Canal Co. v. Garson, 43 Nev. 298, 185 Pac. 801 (1919), 1119 (1920); St. Louis Southwestern Ry. Co. v. Stewart, 150 Ark. 586, 235 S. W. 1003 (1921). See Hanft, "Utilities Commissions as Expert Courts," 15 N. C. L. REV. 12 (1936); Brown, "Public Service Commission Procedure—A Problem and a Suggestion," 87 U. PA. L. REV. 139 (1938).