Chapter 11

Posthearing Procedure

1. The Nature of the Problem

SOME separation of hearing procedure and decision procedure is characteristic of administrative agencies. The hearings are but rarely conducted by an officer with power to make any effective decision. Rather, the decision is frequently made by an officer who was not present at the hearing. The resulting effects on the actual process of case determination can be visualized by comparing the situation with that which would exist if, in the courts, the trial judges, at the termination of the hearing in every lawsuit, simply submitted a summary or memorandum as to the contentions of the parties to an appellate court, which without hearing the parties or reading the evidence, then proceeded to decide all the cases assigned for trial before all the trial judges, relying only on a short oral argument and advice from their law clerks as to the contents of the record and of briefs filed by counsel to determine the facts and law of each case.

While the postulated hypothetical situation represents an extreme, yet it fairly describes a procedure which could be followed by most federal agencies and many state agencies; and it is indicative of the type of procedure actually followed by a number of agencies.

A mere description of the process is suggestive of the difficulties that inhere. As pointed out by the Attorney General's Committee,[1] two undesirable consequences ensue as the conduct of the hearing becomes divorced from responsibility for decision: (1) the hearing itself tends to degenerate; and (2)

[1] Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 45.

the decision becomes anonymous, and therefore less respected.

Of course the procedural mechanics employed vary widely from agency to agency, and changes occur frequently within each agency as attempts are made to devise methods that will meet, so far as possible, the difficulties encountered by the agencies in their attempts to decide wisely and justly the multitude of cases which they can study so little. But the typical course of procedure, recognized in Section 8 (b) of the Federal Administrative Procedure Act of 1946, calls for the making of an intermediate report and recommendation by the hearing officer, which is served on the parties, who then submit exceptions thereto (together with supporting briefs) to the agency, which (with copious assistance of law clerks) proceeds to learn the high spots of the case and then renders its decision. Oral arguments are usually utilized when requested by the parties, but they are typically too short to enable counsel to do more than acquaint the agency with the barest outline of the case.

The system which has evolved owes its existence to practical exigencies rather than to any theory of jurisprudence. Faced with a necessity of deciding a staggering number of cases annually, it has been simply a matter of necessity for the agencies to delegate to assistants, so far as possible, the tasks of hearing and weighing the evidence. Constitutional and statutory proscriptions have ordinarily made it impossible for the agencies to carry this process to its ultimate logical conclusion, by appointing responsible staff members and giving them power to decide cases. Where an agency is given the power to decide cases, it has been held to be the duty of the agency itself (in the sense of the board of three or four or six members appointed by law as members of the agency) to make the decisions and enter the orders.

Many administrators contend ably that this process of decision has worked well and achieved just results. But it is of course impossible to determine whether the decisions would have been otherwise had they been made on the basis of an intensive knowledge of the case, such as that possessed by a trial judge when he makes his decision; and it is likewise impossible to determine whether the decisions as made are on the whole as fair, just, and well considered as would be true if conventional judicial methods were employed. While it serves current exigencies, there can be little defense of this method as a jurisprudential model. It has been quite generally agreed that future development should be in the direction of endowing the hearing officer with substantially the responsibilities and powers of a trial judge, so that the initial decision in the case is by him, and his decision becomes the decision of the agency, unless on an appeal to the agency heads (which would be conducted generally in the manner characteristic of appeals from trial to appellate courts) his decision is reversed.[2] Some agencies have been seeking *sua sponte* to move in this direction, so far as existing statutory provisions permit.

The procedure which has developed has arisen from the necessities of the situation. The number of cases which the agencies are required to dispose of has required delegation. Agencies like the Federal Trade Commission and the National Labor Relations Board frequently dispose of 500 to 700 cases a year. The Interstate Commerce Commission may dispose of 6,000 or more.[3] Transcripts in individual cases frequently run 3,000 to 5,000 pages in length and may be accompanied by several volumes of exhibits. It is obvious that hearing examiners must be employed to take the testimony.

[2] See report of Attorney General's Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 45–46, 51.

[3] 2 B. N. A. Smith Investigating Committee Verbatim Record 360; Exhibit No. 18, Official Hearings, 2731.

Normally, after a hearing has been completed, the hearing officer submits an intermediate report. In the case of the federal agencies, Section 5 (c) of the Administrative Procedure Act of 1946 provides (where a hearing is required by statute) that the officer hearing the evidence shall make the recommended decision or initial decision, except in cases where the record is transferred to the agency heads for initial determination. The nature and effect of this report vary widely in different agencies. In some cases, it is little more than a summary of the contentions of one or both of the parties. In other cases, it embraces a fair summary of the testimony, concluded by findings of fact, conclusions of law, and detailed recommendations as to the disposition of the case. Between these two extremes, of course, there are encountered many intermediate forms. The preparation of the report may represent a diligent and conscientious study of the case by the hearing officer; or, on the other hand, it may be prepared not by the hearing officer but by other employees of the agency—perhaps the attorney who tried the case for the agency.[4]

In agencies where the intermediate reports are typically prepared in careless fashion, they serve little other purpose than to state the respective contentions of the parties. In such cases, the agency heads place but little reliance on the reports. On the other hand, where the general level of performance by the hearing officers is on a higher plane, their reports carry greater weight with the heads of the agency, and are sometimes viewed informally as representing a sort of *nisi-prius* decision of the agency. Section 8 (a) of the Federal Administrative Procedure Act of 1946 contemplates this result.

But whatever the status of the intermediate report (and there is in fact no requirement that such reports be issued or

[4] *Cf.*, Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 112. The Administrative Procedure Act of 1946, § 5 (c), goes some distance toward prohibiting this practice in the case of some of the judicial functions of the federal agencies.

served on the parties, so long as other appropriate means are employed to advise the parties of the agency's contentions) it is necessary, when the case is presented to the agency for actual decision, for the agency heads to learn enough of the case to be able to make their own decision as to its proper disposition. The only way in which it is possible for them to do this is to rely heavily on the assistance of staff employees whose job it is to digest records and briefs and then consult informally with the agency heads, who thus get the case more or less at second hand.

Necessary though this practice may be, and conceding that the staff members to whom are entrusted these heavy responsibilities are on the whole fairly competent, yet it seems clear that full public confidence in administrative procedures cannot be gained until there are eliminated the possibilities of gross maladministration which inhere in this system. The public knows that the staff assistants who thus recommend decision and often write the opinion are frequently inexperienced and untrained. It knows that the positions are generally not such as to attract large numbers of mature and competent men. It suspects that recommendations are sometimes based on a desire to pick and choose from the record something that will support a desired result, rather than on a conscientious analysis of the record. It suspects that portions of testimony or matters of argument which are hard to meet are conveniently ignored, and suspects that it is unduly difficult for counsel to convince an agency on oral argument of the controlling importance of such overlooked portions of the record, when the staff employees assure the agency heads that the record "as a whole" does not support what counsel claims, and when the agency heads do not have time to determine this for themselves.

Many able administrators have pointed out the defects of the current practice.[5] There is a plain need for improvement of administrative procedure at this point. The cure seems to be in the direction, which has so often been suggested and is adopted—for the federal agencies—by Section 11 of the Administrative Procedure Act of 1946, of making the position of hearing officer sufficiently attractive (by endowing it with large powers of decision and the security of assured tenure and liberal compensation) to render it possible to fill these positions with experienced and highly competent professional men, whose initial dispositions of cases will carry sufficient weight to command public confidence and be of such a character that they can safely be accepted as the decision of the agency (subject to limited rights of intra-agency appeal).

2. The Rule That the One Who Decides Must Hear

Under most statutes creating administrative tribunals with judicial powers, power of decision is vested in the agency. It is the agency, and not some staff assistant or employee, who must decide the case. The authority to make the decision cannot be delegated.

But one of the fundamental requirements of a fair trial, previously adverted to [6] is that the one who decides must hear. Such was the phraseology of the Supreme Court in the first of the celebrated *Morgan* cases.[7] The agency, in which alone is vested authority and responsibility to make the decision, must hear the evidence. This, of course, does not require that the agency must listen to all the witnesses, but only that the agency which makes the determinations "must consider

[5] Various criticisms by authors with a wealth of administrative experience are cited in Montague, "Reform of Administrative Procedure," 40 MICH. L. REV. 501, 514 (1942).

[6] Page 150, *supra*.

[7] Morgan v. United States, 298 U. S. 468 at 481, 56 S. Ct. 906 (1936).

and appraise the evidence which justifies them." [8] The reason for this requirement, as the court further explained in the case cited, lies in the fact that the weight ascribed by the law to administrative findings—their conclusiveness when made within the sphere of the authority conferred on the agency—rests on the assumption that the officer or body who makes the findings has considered the evidence and upon that evidence has conscientiously reached a conclusion deemed to be justified thereby.

Limiting the rule thus enunciated by the reason given as its basis, this celebrated decision means little more than this: An agency in deciding a case is required to master the record made in the administrative proceedings to the same degree as a trial judge is required to master the record in a case referred to a referee for the taking of testimony, before reaching his decision.[9] So stated, the rule of the *Morgan* case did not come as a startling innovation. The principle had been previously applied in a variety of cases.[10] But the vigorous language of the opinion, and the attention which the case received as a *cause célèbre*, served to bring into sharp focus the question as to whether administrative agencies, operating under the procedures discussed in the preceding section, were sufficiently mastering the records in the cases they were deciding. The opinion of course did not state (nor could there be enunciated) any precise measuring stick which could be utilized in determining whether an agency had sufficiently performed its duty in this respect. But the case did raise many questions as to just what was required. Most of these questions remain

[8] 298 U. S. 468 at 482, 56 S. Ct. 906 (1936).

[9] This probably contemplates a greater familiarity with the details of evidence than is ordinarily required of an appellate court, which except possibly in cases of equitable reviews *de novo* is not ordinarily required to make evidentiary determinations.

[10] See, e. g., United States *ex rel.* Ohm v. Perkins (C. C. A. 2d 1935), 79 F. (2d) 533; Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U. S. 266, 53 S. Ct. 627 (1933).

unanswered; and, for reasons discussed below, it is doubtful whether the answers will ever be afforded.

A few cases, decided shortly after the first *Morgan* case, intimated that the requirement was that all the members of an agency must personally review the entire record of a case.[11] But this would impose a greater burden on members of administrative agencies than is imposed on courts composed of several judges, and hence goes too far, for it has been suggested in many cases that there is no legal reason and no practical justification for requiring agencies to do more than courts do in mastering the evidence in the record of the case.[12]

While many of the questions raised by the decision in the *Morgan* case remain unanswered, the general application of the principle there declared can be roughly defined—and by way of exclusion, rather than inclusion—by examining cases where it has been held that the procedure adopted by the agency was not improper.

Thus, it is not required that all the members of the agency sit in each case.[13] Nor is it necessary that any member of the agency be present at the taking of testimony; hearing examiners may be appointed.[14] A change in the personnel of an agency during the pendency of proceedings in a particular

[11] State *ex rel.* Madison Airport Co. v. Wrabetz, 231 Wis. 147, 285 N. W. 504 (1939); Joyce v. Bruckman, 257 App. Div. 795, 15 N. Y. S. (2d) 679 (1939).

[12] In some decisions, the duty of the administrative agency in respect to mastering the record is made analogous to the duty of an appellate court. Logically, this is unsound, for the administrative agency makes an original determination, rather than an appellate review; and its mastery of the record should be equated to that of a trial judge who decides a case upon a record made before a master or referee. But as a practical matter, this theoretical distinction will presumably exercise but little influence, because of the fact that, as noted below, the courts generally refuse to undertake the task of determining the extent to which the members of an agency have studied the record of a case.

[13] Frischer & Co. v. Elting (C.C.A. 2d 1932), 60 F. (2d) 711; Frischer & Co. v. Bakelite Corp. (C.C.P.A. 1930), 39 F. (2d) 247.

[14] California Lumbermen's Council v. Federal Trade Commission (C.C.A. 9th 1940), 115 F. (2d) 178; Plapao Laboratories, Inc. v. Farley (App. D. C. 1937), 92 F. (2d) 228; Quon Quon Poy v. Johnson, 273 U. S. 352, 47 S. Ct. 346 (1927).

case does not require that a fresh start be made.[15] The agency members need not personally examine the record; they may employ assistants to sift and analyze the evidence.[16]

The second *Morgan* case [17] is one of the comparatively few cases in which any affirmative showing was made as to the extent to which the deciding authority (in that case a single officer) had examined the record. In that case, the Secretary of Agriculture testified that the bulky transcript of testimony, some 10,000 pages exclusive of exhibits, was placed on his desk and he dipped into it from time to time to get its drift. He read the respondent's brief and a transcript of the oral argument. He conferred with his subordinates who had sifted and analyzed the evidence, and discussed the proposed findings. He said that his order represented his own "independent reactions to the findings" of the men in the Bureau. The court said (by way of dictum) that it would assume that the Secretary sufficiently understood the evidence, and the case was decided on the point that the respondents had not been properly advised of the nature of the claims made by the government. It is not clear whether the court's assumption was based on the supposition that such a study of a record was sufficient, or whether it was based on the proposition that it was improper for the courts to probe the mental processes of administrative officials. The significance of the case is thus obscured. Nevertheless, it is generally indicative of what is permitted.

In any event, due process does not require that the members of an agency hear or read a transcript of the testimony,[18]

[15] United States *ex rel.* Minuto v. Reimer (C.C.A. 2d 1936), 83 F. (2d) 166; Eastland Co. v. Federal Communications Commission (App. D. C. 1937), 92 F. (2d) 467; Vogeley v. Detroit Lumber Co., 196 Mich. 516, 162 N. W. 975 (1917).

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

[17] 304 U. S. 1, 58 S. Ct. 773, 999 (1938).

[18] Sec. 10 of the Model State Act provides that the officials who are to render the decision "shall personally consider the whole record or such portions thereof as may be cited by the parties." Similarly, Section 7 (c) of the Federal Admin-

but only that they sufficiently familiarize themselves with the evidence to be able to render a decision based thereon. So stating the requirement, it becomes obvious that it is exceedingly difficult to determine, in any particular case, whether the members of the agency did in fact perform their duty of mastering the record. Ordinarily, the only source of information on this critical point would be the testimony of the agency members. Unless they can be compelled to testify as to the extent to which they familiarized themselves with the record in deciding a case, there is ordinarily no method of raising the question.

It quite clearly appears that the courts will not permit agency members to be summoned for cross-examination as to this. The impropriety of such examination, suggested in the second *Morgan* case, *supra*, was strongly emphasized in a later opinion.[19] Similarly, attempts to require members of agencies to answer depositions raising particular questions as to their consideration of a specific case have been almost uniformly unsuccessful.[20]

Thus (except where specific statutory requirements exist), the broad requirement that the members of an agency in deciding a case must sufficiently master the record made therein so as to be able to reach an independent decision based on the evidence taken in the case, is one which for most practical

istrative Procedure Act in terms requires agencies to consider the whole record or such portions thereof as may be cited by any party.

[19] United States v. Morgan, 313 U. S. 409, 61 S. Ct. 999 (1941).

[20] In National Labor Relations Board v. Cherry Cotton Mills (C.C.A. 5th 1938), 98 F. (2d) 444, interrogatories were allowed; but the court relied largely on particular factors deemed to indicate unfair administrative handling of the case; and this decision was distinguished and limited in a later decision of the same court, denying the issuance of interrogatories. National Labor Relations Board v. Lane Cotton Mills Co. (C.C.A. 5th 1940), 108 F. (2d) 568. Other cases refusing to permit similar inquiries are: National Labor Relations Board v. Biles Coleman Lumber Co. (C.C.A. 9th 1938), 98 F. (2d) 16; Cupples Company Manufacturers v. National Labor Relations Board (C.C.A. 8th 1939), 103 F. (2d) 953; National Labor Relations Board v. Botany Worsted Mills, Inc. (C.C.A. 3d 1939), 106 F. (2d) 263; Inland Steel Co. v. National Labor Relations Board (C.C.A. 7th 1939), 105 F. (2d) 246.

purposes is committed to the consciences of agency members. And this of course is in keeping with the spirit which recognizes administrative agencies as independent instrumentalities of justice, collaborative with the courts, whose independence and integrity must be respected.[21]

3. Necessity of Intermediate Findings by Hearing Officers

In fulfilling their duty to master the essence of the record in each individual case decided judicially, agencies have found that ordinarily the most effective and expeditious aid toward this end is to require the officer who hears the testimony to prepare an intermediate report which at least summarizes the claims of the parties and normally contains at least some suggestion as to what findings the hearing officer believes should be made by the agency (in cases where Section 8 of the Federal Administrative Procedure Act applies, the hearing officer must submit a recommendation as to what the decision should be). Even if it serves only to narrow the focus of argument before the agency itself, such a report is obviously of great value.

So common has the practice become, and so dismayed is the litigant who is deprived of the advantages of receiving such an intermediate report, that it has been urged that failure to provide some statement as to the findings and recommendations of the hearing officer, to guide the parties in their further presentation of the case before the agency, is in itself tantamount to a denial of a fair trial.

As to this, the rule adopted by the courts has been that if no alternative device is employed to apprise the parties fairly of the claims and contentions made by the agency, then the absence of the intermediate report may be fatal. But it is considered as only one of several alternative devices which may perform this function; and if the respondents are otherwise fully advised of the issues on which the agency will

[21] See United States v. Morgan, 313 U. S. 409, 422, 61 S. Ct. 999 (1941).

decide the case, the absence of an intermediate report is not fatal.[22]

4. The Adjudication of Cases and the Separation of Powers

It is, of course, at the stage of actual decision that there is brought into sharp focus the question as to the effect of combining in a single agency the powers of witness, prosecutor, judge, and executioner. This general problem is primarily a matter involving constitutional questions as to the separation of powers.[23] The effect of such combination characterizes the whole administrative process, and the stage of decision is only one point of impact.

However, one extreme consequence of the hazards inherent in complete combination of powers within an agency appears intimately as a part of the actual process and mechanics of decision-making. It occurs where a staff member who investigated a case *ex parte,* or the agency's attorney who handled the trial of the case, is permitted to write the findings, opinion, or decision of the agency—or to collaborate to a large degree in the writing thereof. There can be no valid reason for such practice, and Section 5 (c) of the Administrative Procedure Act of 1946 goes far toward eliminating it in the case of the federal agencies. But here again, the reponsibility for avoiding this situation is one which must be entrusted to the agencies.

5. Requirement That Final Decision Be Supported by Findings

It is often required by statute, and perhaps by the Constitution [24] that the determination of an administrative agency

[22] Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 999 (1938); National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 904 (1938); National Labor Relations Board v. Hearst (C.C.A. 9th 1939), 102 F. (2d) 658.

[23] See, *supra,* p. 50 *et seq.*

[24] Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241 (1935).

must be supported by findings. This requirement presents greater difficulties in cases where the administrative order is primarily legislative in character than in cases where the determination is essentially judicial in nature. In the latter type of case, established administrative practice (recognizing the practical necessity of a statement of findings as a matter of sound administration, as a condition precedent to effective judicial review, and perhaps as a constitutional requirement) is to rest each determination on definite findings.[25]

[25] On the broad question as to the necessity of findings, see many cases collected in Vom Bauer, FEDERAL ADMINISTRATIVE LAW (1942) 535 *et seq.*, Gellhorn, ADMINISTRATIVE LAW (1942) 770 *et seq.*; 146 A. L. R. 209.