Chapter 6

Prehearing Conferences and Informal Procedures

THE essential difference in character between court proceedings and the administrative process is epitomized by the contrast in the nature of the activities which follow the filing of pleadings. In a court case, after the pleadings have been filed and the case brought to issue, it is placed on the docket of cases ready for trial, and there it rests until trial day. The court has little if any concern with the case prior to the opening of the trial.[1] In the case of proceedings before an administrative agency, on the other hand, the crucial point of official action is typically reached in the interim between the filing of pleadings and the hearing. The trial procedure is, in many cases, reserved as a method of last resort for disposing of cases which cannot be otherwise terminated.

1. Purposes of Prehearing Procedure

From the viewpoint of the administrative agency, informal negotiations concerning pending cases offer many advantages. First and foremost, it is only by use of such informal procedures that the agencies can keep abreast of their heavy case loads. Many agencies dispose of nine tenths or more of all matters instituted before them without trial. In some cases,

[1] Sometimes, of course, preliminary motions must be disposed of; but these ordinarily involve only a ruling on subsidiary legal issues—they are, so to speak, "little trials." In many jurisdictions, too, pre-trial hearings are becoming common. But even in such cases, the court's concern is principally with such formal points as the settlement of the pleadings, the fixing of a trial date, and related matters designed to facilitate the holding of the trial, which remains the important focal point.

the percentage is even higher.[2] The agencies would be compelled to neglect many cases requiring attention if it were necessary to adopt the hearing-and-adjudication technique in each case. Imbued as they are by a desire to fulfill what they deem to be their broad social missions, the agencies find other reasons for preferring the informal procedure. They can sometimes persuade a party to adopt a course of action which he perhaps could not be compelled to adopt if he resisted formal proceedings directed to such end, or they can obtain agreements that something be done which it would be beyond their powers to compel. An effective means is thus afforded for reforming marketing practices, financial practices, or labor relations practices along the general lines deemed desirable by the agencies concerned. In working toward these broad ends, the agencies, so long as they restrict their activities to the informal procedures, can operate in an atmosphere of uncontrolled discretion, bound by no substantive or procedural rules.

From the viewpoint of the private parties concerned, these informal proceedings are important for other reasons. The respondent faces a practical necessity of discussing his case informally with the agency in order that he may learn exactly what is involved. It is often the only practical means of learning, in advance of the hearing, the actual claims of the agency and the true issues involved. Similarly, consultation

[2] In a recent ten-year period, the Interstate Commerce Commission arranged settlements in all but five of some 3,500 demurrage complaints filed with it. The National Labor Relations Board, over a period of several years, settled more than 90 per cent of all unfair labor practice complaints without issuance of formal proceedings; and of cases where formal proceedings were instituted only about 50 per cent proceeded to a final formal determination. The various bureaus and divisions of the United States Department of Labor accomplish most of their business informally. In one recent year, the Department of Agriculture, which administers twenty-odd regulatory statutes, involving thousands of cases annually, found that only some 250 went to formal hearing, and of these only about one seventh proceeded beyond the state of exceptions to the examiner's intermediate report.

and conference are frequently the only methods of ascertaining the existence and content of various unpublished rulings and general counsel opinions which may be determinative of the administrative ruling: instead of briefing judicial decisions in his library, the attorney must learn of the agency's precedents by interviews with the agency's representatives. Despite the fact that the informal procedures are primarily designed to permit the agency to avoid the trial of cases, the respondent can thus advantageously utilize such procedures as an effective means of trial preparation.

Other advantages are offered the respondent. Consultation and conference with agency representatives offer him an opportunity to convince the agency of the fairness of his position; and if this can be done his worries are very nearly at an end. Furthermore, negotiation with agency attorneys often serves to disclose alternative bases of settlement; counsel for respondent can learn of various formulas, stipulations, or agreements which the agency will sometimes consent to as a means of disposing of the case. Such alternative solutions often afford, so far as the respondent is concerned, an easy way out. Sometimes the agency will be satisfied with a concession which the respondent is entirely willing to make. These possibilities can be explored only by intelligent use of the informal procedure, for the agency rules do not ordinarily disclose these alternative possibilities, and agency representatives are likely at the outset to suggest only such modes of settlement as are most favorable to the agency, rather than those which are most favorable to the respondent.

2. Need for Rules Regulating Prehearing Procedures

The advantages inherent in the informal procedures of administrative tribunals are so important as to discourage any suggestion that they should be eliminated. They are, in fact, the very lifeblood of the administrative process, and the

problem is to discover means of minimizing certain inherent difficulties without losing the great advantages that the practice offers.

The central difficulty is that the situation offers opportunities for abuse of power. Citizens who are accustomed to consult attorneys only in connection with court matters often undertake to deal with representatives of administrative agencies without first obtaining advice as to their legal rights. They often rely on the representatives of the agency to learn what the law requires of them. This of course heightens the importance of scrupulous fairness on the part of the administrators and their assistants. Granting the existence of this, it still remains inevitable that in negotiations looking toward a possible settlement, the government agency has many advantages.[3] A private party has no desire to be in the bad graces of the agency which administers a law affecting his business. There is a tendency on the part of the respondent to make the best bargain he can with the agency rather than carry the matter to a formal hearing. This tendency may be almost impelling in cases where time is of the essence—as where the applicant seeks a license to issue an offering of securities or to continue the operation of a radio station, or where the respondent's challenged course of action constitutes, if illegal, a continuing offense entailing daily increasing penalties. Then, too, the expense of conducting an action and carrying an appeal through the courts is a factor which weighs heavily with the private party and which sometimes prompts him to sacrifice his legal rights in favor of accepting a settlement offered by the government.

If an agency is so inclined, it can make use of these innominate sanctions which attend the informal administrative procedures in such a way as to nullify largely the formal

[3] Chamberlain, Dowling, and Hays, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942) 12.

safeguards which the principles of procedural due process have erected as a shield against arbitrary administrative action.[4]

While it is impossible to eliminate this possibility of abuse, much could be done to ameliorate the situation through the adoption of definite rules that would crystallize administrative procedure. Section 4 of the Administrative Procedure Act of 1946 goes a great distance in this direction, so far as the federal agencies are concerned. While the flexibilities of the informal procedures should not be sacrificed, yet they could be regularized without serious injury to any valid administrative purpose. Adoption of adequate rules of procedure, not conceived in any narrow sense but covering the important steps to be taken, would make available to the parties affected by quasi-judicial action a guide to practice and assistance in adequate preparation for the hearing. Such rules would enable the parties to know what alternative solutions were available. They would enable the parties to know in advance the general policies which would control administrative action. They would enable the parties to know exactly what procedures were open to them, and with whom the case could be discussed. More important, they would tend to accomplish uniformity of procedure in like proceedings within an agency, so that the manner in which a proceeding was conducted, and the determination reached, would not depend on the particular administrative officer who happened to conduct it.[5]

Quite apart from the tendency to reduce the possibilities for unfairness, adoption of procedural rules would otherwise aid in developing the efficiency of the informal procedures of administrative agencies.

[4] *Idem.*, 86.

[5] Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 36.

3. Prehearing Narrowing of Issues

Adoption of procedural rules setting up a regular method of prehearing conferences designed to narrow the issues and explore possibilities of settlement would be of great practical aid to the agencies and the parties appearing before them.

Under conditions that prevail in most agencies, it is difficult for the parties even to ascertain with whom such possibilities may be discussed. Not infrequently, no one save the head of the agency has power to make any binding stipulations as to the facts or as to the issues; and the agency heads ordinarily are unable to take any part in informal prehearing conferences, because their whole time and attention is consumed with matters of intra-agency administration, with considering general policies, and with the decision of cases that have been fully heard. Even if no formal stipulation is sought, and the desire is only for informal discussion, this frequently necessitates a trip to the central offices of the agency, which may be hundreds of miles away from the respondent's place of business. If such a trip be undertaken, the agency representative, as likely as not, will be required to take the position that he has no authority to make any bargain and that he cannot, on behalf of the agency, agree to forego any of the formal demands which have been made, in favor of reaching a compromise agreement. Further, any such conferences must be undertaken as a matter of private negotiations, without the aid that could be given if a hearing officer presided over the conference, just as a judge presides over the pre-trial hearing of a lawsuit, at which counsel for the parties discuss just such issues—the possibility of settlement, simplification of issues, amendments to the pleadings, stipulations as to facts and documents, limitations of the number of expert witnesses, and such other matters as may aid in the efficient disposition of the case. Ordinarily, the

private parties are unable to have any contact with the hearing officer before the hearing opens. In some agencies, there is consultation in advance of the hearing between the hearing officer and the representative of the agency who is to present the agency's case at the hearing. Whether or not this results in actual prejudice to the respondent, it creates at least an appearance of unfairness which is sufficient to condemn the practice.[6]

All these difficulties could be avoided by adoption of procedural rules designed to set up a regular system of pre-trial hearings. This has been recommended by the Attorney General's Committee on Administrative Procedure.[7] Such a device would not rob the prehearing procedures of their flexibility or informality. It would simply improve their effectiveness. Provision could be made by rule for a prehearing conference to be conducted well in advance of the hearing, at a place convenient to the parties, and before a hearing officer, who would consult with representatives of the agency and representatives of the private parties in order to ascertain exactly what issues were in dispute, and what stipulations could be made as to the facts, and what compromise agreements might be feasible. Power could be given to authorized representatives of the agency to make binding stipulations and firm commitments as to settlement.

Such procedure would go far to remove many of the justified criticisms directed toward the present unsystematized practice by parties who are caught in its meshes. It would, further, facilitate rather than hinder the effective disposition of the agency's business, as has been demonstrated by the

[6] *Cf.*, Benjamin, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK (1942) 112.

[7] Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941) 67.

success with which such innovation has been met in the cases where it has been tried.[8]

4. Use of Informal Procedure in Disposing of Case by Consent

The difficulty that is inherently present in the situation where an automobile driver undertakes to bargain with a traffic policeman on the question as to whether or not a ticket will be issued is also present, in greater or less degree, in most cases where negotiations are undertaken between representatives of an administrative agency and a respondent with the hope of discovering a means of disposing of the case by consent. But, as above indicated, in many types of cases there is room for bargaining, without any sacrifice to the public interest which the agency must uphold and enforce.

The central problem in practice is whether or not, in cases where a mutually satisfactory means of disposing of the case can be found, the agency will insist on an admission of guilt before the issuance of a consent order. Some agencies do so insist. For example, the Federal Trade Commission long followed the rule that, after a formal complaint was issued, the respondent must formally admit at least one of the

[8] Stipulation procedures are used quite widely by the Interstate Commerce Commission in reparations cases, by the Civil Aeronautics Board, and in proceedings under federal workmen's compensation laws. A few agencies provide for stipulations by rule—e. g., the Bituminous Coal Division, the Federal Power Commission, the Interstate Commerce Commission, and the United States Maritime Commission. While obvious factors make it more difficult to reach settlements or compromise agreements in cases before administrative agencies than in private civil actions, yet there is often considerable basis for bargaining. For example, in case of proceedings under the Wage Stabilization Law, 56 Stat. 765, Ch. 578, the matter of agreeing on the amount of penalty to be imposed for unauthorized wage or salary adjustments was different only in emphasis from the matter of agreeing on the amount of damages to be allowed in a personal injury case. In other types of cases, it can sometimes be agreed that asserted past violations may be disregarded if the respondent adopts and agrees to adhere in the future to a course of conduct meeting the requirements and standards imposed by the agency.

charges before any consent order could be entered. Frequently, the respondent, although willing to comply with the course of action of which the Commission is desirous, feels he cannot make an insincere admission of guilt because of the prospect that it might afford a basis for a subsequent civil damage action. Other agencies have not imposed this requirement. For example, the National Labor Relations Board requires only that the respondent admit that his business substantially affects interstate commerce. Then, on a finding that the respondent is engaged in commerce, that a complaint has been issued, and that a stipulation has been made, the Board issues the order agreed on in the stipulation.[9]

There appears to be no compelling reason to require an admission of guilt as a condition precedent to the issuance of a consent order. Often, the respondent in good faith asserts his complete innocence of the charge, but is willing to submit to the entry of an order enjoining a specified course of future conduct. The latter is, often, all that the agency or the public interest requires. The rules of the agencies should permit the entry of consent orders, on stipulation, without admission of guilt.

This device of a consent order has even greater usefulness in cases where the parties informally consult with the agency before any actual formal complaint is issued. Some agencies nevertheless require the respondent to make certain admissions of fact as a condition of the entry of a consent order, even in these cases where no formal complaint has been filed.

[9] The National War Labor Board developed an interesting practice, in connection with its duty of penalizing violations of the Wage Stabilization Law. Thereunder, the alleged offender could submit a proposed statement of facts—the truth of which he was not compelled to admit; on the contrary, he could expressly deny that the facts were such—and stipulate that if the Board fixed the penalty in a named amount, he would waive his rights to a hearing and consent to the entry of findings in accordance with the statement as submitted. If the proposed settlement was satisfactory to the Board, it would so find the facts, and issue an order imposing the agreed penalty. If it was unsatisfactory, the stipulation was rejected and could not thereafter be used for any purpose.

Surely, the better practice is that of the National Labor Relations Board, under which the agreement is reduced to writing, and the charges withdrawn.

Another important utility of the informal procedure, when availed of as a means of settling a case without resorting to formal proceedings, is the possibility of avoiding concomitant hardships that follow from the issuance of a formal complaint or order. For example, the Securities and Exchange Commission issues deficiency letters, indicating what amendments will be required in registration statements as a condition of avoiding a stop order which would formally put in contest the right of an issuer to market a security offering. Issuance of a stop order, in view of the sensitivity of market conditions, would normally (whatever the outcome of formal proceedings as to the propriety or sufficiency of the prospectus) render it impossible to market the securities—the offering would be for practical purposes an impossible venture. Similarly, the National Labor Relations Board consults with the parties while it is considering the issuance of a complaint charging unfair labor practices; and if a satisfactory adjustment is reached, the employer avoids the stigma that in some measure attaches to the issuance of a complaint. It is well known that the issuance of a complaint by many federal agencies, such as the Federal Trade Commission, to cite a typical example, is frequently a cause of substantial hardship to the accused (particularly in view of the wide publicity given the issuance of the complaint), even if the Commission subsequently finds that no illegal practices had been committed.

Statutory recognition and regulation of the practice of "informal disposition," and development of procedural rules to facilitate the usefulness of the informal prehearing procedures (achieving the desirable end of avoiding unnecessary hardship in cases that do not involve any intentional viola-

tion), would go far toward meeting criticism of administrative absolutism. The Federal Administrative Procedure Act moves in this direction. Section 5(b) requires the giving of an opportunity to present such proposals, in cases where a hearing is required by statute. Section 4 operates to promote informal dispositions in cases of rule making. In other cases, Section 6(a) and Section 6(d), supplemented by the application of Section 9 and Section 10, indicate the general scope of informal procedures.

5. Inspections and Tests

In cases where the administrative adjudication is based on inspections or tests, informal methods afford private interests perhaps even greater protection than would formal hearing procedures. For example, when the issue involved is the fitness of food, the seaworthiness of a ship, or the ability of an individual to fly an airplane, no form of hearing would be as well calculated to reveal the truth as an actual inspection or test.

But even here a problem is involved, for ordinarily in such a proceeding no record can be made on which a party can appeal to the courts for relief from what he deems to be a clearly erroneous administrative determination. In cases where an administrative agency denies a license on the basis of an informal inspection or test, great good could be achieved by the adoption of rules providing that after such denial, the applicant could obtain an administrative redetermination of the same issue, on the basis of a formal hearing. This would render it possible for the applicant to obtain a judicial review of any claims that the administrative determination exceeded the permissible bounds of discretion and was capricious and arbitrary.