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Through a comparative analysis of cases decided in the United States Supreme Court and the Supreme Court of Ohio, Mr. Goldfarb calls attention to a serious problem in administrative procedure. It is his view that, in many cases, appellate courts reverse the rulings of administrative agencies without providing adequate instructions regarding additional evidence, testimony, and findings of fact. This enables the agency to reconsider the remanded case according to the dictates of its own discretion rather than those of the reviewing court, thereby rendering the litigant's right to judicial review "a meaningless formality." The author concludes that appellate courts can resolve this problem by issuing specific instructions for administrative agencies to follow on remand.

IN THE 1962 CASE of *Lakeside Truck Rental, Inc. v. Bowers*,[1] the Ohio Supreme Court reviewed a Board of Tax Appeals' entry as to whether trucks leased from Lakeside by two large retail furniture stores were subject to the Ohio sales tax.[2] Although the record contained uncontradicted testimony that the trucks were used to haul bulky items to the stores' customers, the Board concluded that "there is no evidence that appellant was in the business of making 'retail sales' of furniture and appliances, and it is therefore obvious that its claim that it used the trucks directly in making retail sales is without merit."[3] Rather, Lakeside was held to be in the business of making "retail sales" of automotive equipment.[4]

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[1] 173 Ohio St. 108, 180 N.E.2d 140 (1962), *reviewing* Case No. 45016, Ohio B.T.A., June 2, 1961, *on remand*, Case No. 45016, Ohio B.T.A., April 13, 1962, *aff'd*, 174 Ohio St. 405, 189 N.E.2d 723, *cert. denied*, 375 U.S. 905 (1963).

[2] OHIO REV. CODE § 5739.01 provides in part:

> (B) "Sale" and "selling" include all transactions by which title or possession, or both, of tangible personal property, is or is to be transferred . . . for a consideration . . . whether for a price or rental. . . .
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> (E) "Retail sale" and "sales at retail" include all sales except those in which the purpose of the consumer is:
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> . . . .
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> (2) . . . to use or consume the thing transferred directly . . . in making retail sales . . . .

[3] Case No. 45016, Ohio B.T.A., pp. 3-4, June 2, 1961.

[4] *Ibid.*

In reversing the Board's decision, the Ohio Supreme Court held that the rental of one of Lakeside's trucks would not constitute a taxable event under the statute if the truck were used by the furniture stores in making retail sales.[5] Furthermore, the court found that it was necessary to remand the case for further proceedings,[6] since the Board had not considered whether there was sufficient evidence to support a finding that the furniture companies utilized the rented trucks in delivering items sold to customers under contracts which were not completed until delivery was made.

Notwithstanding the decision of the supreme court, the Board summarily and without notice caused an entry to be made[7] which stated that the testimony regarding use of the trucks was mere opinion and that there was no evidence in the record to indicate that the witness was in any position to know exactly how the trucks were being used; therefore, there was no proof that the trucks were used in such a way as to exempt the rental charges from sales taxation (a conclusion which was not based on any evidence in the record).[8] The Board concluded that "the testimony and evidence in the record is insufficient to support the finding that the purpose of the furniture company was to use the rented trucks for diliveries [*sic*] of items sold to retail customers under contracts of sale not to be completed until such deliveries had been made."[9]

Again the matter was appealed to the Supreme Court of Ohio,[10] but the court stated:

> The Board of Tax Appeals could very well have opened up the case and heard additional evidence on the question but apparently did not think it necessary to do so. . . .
>
> From an examination of the record, this court is unable to find that the decision of the Board of Tax Appeals is unreasonable or unlawful.[11]

The problem thus presents itself: Shall an administrative agency, after remand by a reviewing court, proceed on the record before it or rehear the matter in whole or in part, and under what circumstances shall it take such action? The various opinions in the *Lake-*

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[5] 173 Ohio St. at 109, 180 N.E.2d at 141.

[6] *Id.* at 110, 180 N.E.2d at 142.

[7] Case No. 45016, Ohio B.T.A., April 13, 1962.

[8] *Ibid.*

[9] *Ibid.*

[10] Lakeside Truck Rental, Inc. v. Bowers, 174 Ohio St. 405, 189 N.E.2d 723, *cert. denied*, 375 U.S. 905 (1963).

[11] *Id.* at 407, 189 N.E.2d at 724.

side Truck Rental case[12] very neatly present these questions. It should be pointed out, however, that we are not concerned here with the scope of review, the weight or value of uncontradicted testimony before an administrative agency, the procedural niceties of appeal, or the fact-finding duties of an administrative agency, but only with that course of action taken by an administrative body *after* remand.

The appeal to the supreme court in 1962 established the principle of law that leased trucks used directly in making a delivery, which is an essential part of making a retail sale, are exempt from the sales tax.[13] This conclusion was based on the record before the court. On the same record, however, the Board of Tax Appeals in its second opinion engaged in a lengthy discussion of the type of evidence the taxpayer "could have" and "should have" presented.[14] But the court, in its second (1963) decision, stated that the Board was empowered but not obligated to receive additional evidence.[15] On remand, therefore, if the decision as to whether or not a case should be reopened lies with the administrative agency, it becomes a simple matter for that agency to ignore the law as laid down by a reviewing court and replay the facts to justify its original position.

A reviewing court formulates new law based upon the record before it;[16] however, an administrative agency can find that it does not agree with the reviewing court because of matters *not* in that record. Although the agency is the exclusive fact finder on remand with legal pronouncements, it is faced with one of two courses: (1) proceed on the record as it appeared on the appeal, or (2) reopen the proceedings for additional hearings.[17]

It would appear that — in the absence of a mandate requiring a rehearing — when a reviewing court enunciates a new principle of law which was rejected by the agency or when the record is insufficient for the legal concept to be applied, the administrative agency should rehear the case on its own motion. If, after such a rehearing, the agency can come to no other conclusion, then at least

[12] Case No. 45016, Ohio B.T.A., June 2, 1961, *reviewed*, 173 Ohio St. 108, 180 N.E.2d 140 (1962), *on remand*, Case No. 45016, Ohio B.T.A., April 13, 1962, *aff'd*, 174 Ohio St. 405, 189 N.E.2d 723 (1963).

[13] Lakeside Truck Rental, Inc. v. Bowers, 173 Ohio St. 108, 110, 180 N.E.2d 140, 141 (1962).

[14] Case No. 45016, Ohio B.T.A., April 13, 1962.

[15] See text accompanying note 11 *supra*.

[16] OHIO REV. CODE § 5717.04.

[17] Dolcin Corp. v. FTC, 219 F.2d 742, 755 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 981 (1955).

the remand was not futile. Reviewing courts and administrative agencies each have their respective roles. When a reviewing court lays bare an error of law, its function ends and "at that point the matter once more goes to the Commission for reconsideration."[18] A reviewing court, after baring an error and compelling obedience to its correction, exhausts its power. At this point the agency is again charged with the duty of "judging"[19] and, although it is not foreclosed from enforcing legislative policy, its new order must not conflict with the reviewing court's mandate.[20]

In *SEC v. Chenery Corp.*,[21] the Supreme Court of the United States considered the action of the Securities and Exchange Commission in refusing to allow the management of a corporation to place recently purchased preferred stock on an equal par with the corporation's other preferred stock during a reorganization period. There was no issue of fraud or lack of disclosure and there was no dispute as to the facts. In justifying its action, the Commission stated that it was merely applying "the broad equitable principles enunciated in the cases heretofore cited."[22] The Court, however, could not find that the transaction violated any statutory prohibition, judicial doctrine, or any rule of the Commission within its delegated authority.[23] The case was therefore remanded to the Commission.[24]

In his dissenting opinion, Mr. Justice Black concurred with the action of the Commission and agreed that such action was "appropriate."[25] He also concurred with the Commission's reliance upon the common law and stated: "As judges we are entitled to a sense of gratification that the common law has been able to make so substantial a contribution to the development of the administrative law of this field."[26]

The matter again came before the Supreme Court three years later.[27] The Court found that after its remand, the Commission "reexamined the problem, recast its rationale and reached the same

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18 FPC v. Idaho Power Co., 344 U.S. 17, 20 (1952).

19 FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940).

20 FTC v. Colgate-Palmolive Co., 380 U.S. 374, 379 (1965).

21 318 U.S. 80 (1943).

22 *Id.* at 87 (quoting from the SEC opinion).

23 *Id.* at 93.

24 *Id.* at 95.

25 *Id.* at 97-98.

26 *Id.* at 98.

27 SEC v. Chenery Corp., 332 U.S. 194 (1947).

result."[28] Such reexamination, however, was held to have been sufficient and the Commission's decision was affirmed on the ground that it rested "squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts."[29]

While *Chenery Corp.* and *Lakeside Truck Rental* have very little in common except the fact that, in both cases, a reviewing court confirmed an administrative action which had previously been rejected, the dissenting opinion in the second *Chenery* decision[30] is equally applicable to both cases. Mr. Justice Jackson first called attention to the fact that the Commission had reached the same result on remand even though there had been "no change in the order, no additional evidence in the record and no amendment of relevant legislation . . . ."[31] The effect of the Court's affirmance, therefore, was said to make "judicial review of administrative orders a hopeless formality for the litigant . . . ."[32] He concluded:

> I suggest that administrative experience is of weight in judicial review only to this point — it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding.[33]

Although Mr. Justice Jackson's dissent in *Chenery* is generally applicable to the *Lakeside Truck Rental* case, it should be noted that there are some distinctions between the two cases. First, the Securities and Exchange Commission recognized the issue in *Chenery*, whereas in *Lakeside Truck Rental* the Board of Tax Appeals failed to recognize it. Second, no new principle of substantive law was announced in *Chenery*, while in *Lakeside* the court established a principle of primary significance on the first appeal that was not applied in the first administrative hearing. Third, the Court in *Chenery* was concerned with the agency's rationale rather than its conclusion, whereas in *Lakeside* the court was concerned only with the Board's conclusion. Finally, the Securities and Exchange Commission did not require any additional evidence to justify its conclusion upon remand of the *Chenery* case. In *Lakeside*, however, the

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[28] *Id.* at 196 (quoting from the SEC opinion).

[29] *Id.* at 209.

[30] *Id.* at 209-18.

[31] *Id.* at 210.

[32] *Ibid.*

[33] *Id.* at 215.

Board admitted that it would have liked to hear the testimony of an officer of one of Lakeside's customers, speculated as to how the trucks could have been used, and meditated on how Lakeside "should have" proved its case regardless of the uncontradicted testimony in the record.[34]

In the second *Lakeside* appeal, the Ohio Supreme Court was concerned with not substituting its judgment in factual issues for that of the Board of Tax Appeals in spite of the fact that in the same opinion it stated that the Board could have reopened the case and heard additional evidence but apparently thought it unnecessary to do so.[35] The question arises, however, as to when additional evidence is needed and by whom this decision is to be made. "Surely an administrative agency is not a law unto itself . . . ."[36] If left to the agency's initiative, is not the decision an "encouragement . . . to conscious lawlessness as a permissible principal rule of administrative action"?[37] If so, the continued effectiveness of judicial review is endangered.

Only a reviewing court can effectuate its mandates. An administrative agency should certainly not be left to do as it may think necessary. If the agency can do as it pleases, it can always recast its rationale to justify its first decision and make "judicial review of administrative orders a hopeless formality for the litigant."[38]

In the first decision in *Lakeside*, the Ohio Supreme Court pointed out that the question involved was not as the Board indicated in its opinion and went on to enumerate the new principle of law about which "there are no decisions of this court."[39] In view of the fact that the Board of Tax Appeals had ignored the question completely, it could not very well have considered the question of whether the evidence was sufficient. Accordingly, in its second opinion the Board became very specific regarding the type of evidence it "should have" and "would have" heard.[40] Under these circumstances, the Board should have heard additional testimony regardless of the fact that the record contained uncontradicted testimony regarding the

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[34] See text accompanying note 14 *supra*.

[35] Lakeside Truck Rental, Inc. v. Bowers, 174 Ohio St. 405, 407, 189 N.E.2d 723, 724 (1963).

[36] SEC v. Chenery Corp., 332 U.S. 194, 215 (1947) (dissenting opinion).

[37] *Id.* at 217 (dissenting opinion).

[38] *Id.* at 210 (dissenting opinion).

[39] Lakeside Truck Rental, Inc. v. Bowers, 173 Ohio St. 108, 109, 180 N.E.2d 140, 141 (1962).

[40] See text accompanying note 14 *supra*.

transactions. By relying upon its discretion, the Board may have frustrated not only the court's decision but also the demands of justice.

The problem is easily solved by reviewing courts being more specific in their orders of remand — once it has been determined that remand is necessary. If the court finds the record adequate to establish a new principle of law, that record is at least adequate for an administrative agency to follow the law of the case unless the reviewing court indicates otherwise.

Generally, a reviewing court may: (1) affirm (if the order is supported by reliable, probative, and substantial evidence and is in accordance with law); (2) reverse, vacate, or modify the order; (3) make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law; or (4) remand the case with instructions to enter an order consistent with the findings and with its opinion.[41] The last is our concern. In the usual case, the court first determines whether the correct rule of law was applied to the facts found and

> whether there was substantial evidence before the Board to support the findings made. . . . If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. . . . And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.[42]

Upon remand, it would seeem that it is the reviewing court's responsibility to determine whether the record is sufficient. Since this decision is an essential aspect of the review and the basis for a legal determination of the issues, it cannot be delegated to the administrative agency. The rule to be followed was stated in *FTC v. Curtis Publishing Co.*:[43] "[T]he Court must also have power to examine the whole record and *ascertain for itself* the issues presented and

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[41] An appeal from the Ohio Board of Tax Appeals to the Supreme Court of Ohio is based on Ohio Revised Code § 5717.04 which reads in part:

> If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

[42] Helvering v. Rankin, 295 U.S. 123, 131-32 (1935). (Footnotes omitted.) In other words, on remand if findings are absent which may be made on the basis of evidence already received, a rehearing is not necessary. However, if evidence material to a particular point is required, it may be heard.

[43] 260 U.S. 568 (1923).

whether there are material facts not reported by the Commission."[44] The Court went on to say:

> If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission — the primary factfinding body — *with direction to make additional findings*, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay the court has full power under the statute so to do.[45]

The phrase "with direction to make additional findings" is recognized by the courts but not always contained in a remand. A reviewing court must give "instructions" to an administrative agency to carry out rulings and make correct findings.[46] There is no limitation as to the manner in which a remand is worded, and the administrative agency should therefore confine itself to the issues and the law as recited by the reviewing court. Concise and specific instructions are required in order that no interpretation will be necessary to determine the reasons for remand. For example, there was no doubt as to the significance of remand in *FTC v. Carter Prods., Inc.*,[47] in which the Court stated:

> Certiorari is granted and the judgment of the Court of Appeals is vacated. The cause is remanded to the Court of Appeals *with directions* to reinstate *its prior judgment and order after amending it so that it specifically authorizes the Federal Trade Commission to open this proceeding for further evidence and a new order consistent with the Court of Appeals opinion herein.*[48]

The remand is a judicial precept that must be enforced as written because it is the judgment of the reviewing court. If it is clear and "plainly means a rehearing of the issues as if the former hearing has not been had,"[49] then an administrative agency will not act as it may deem necessary but will act in a manner consistent with the reviewing court's decree.

An administrative agency which has acted under a mistaken view of law should have its order set aside, and the proceedings on remand should include a hearing de novo.[50] Although this proce-

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[44] *Id.* at 580. (Emphasis added.)

[45] *Ibid.* (Emphasis added.)

[46] East Ohio Gas Co. v. Public Util. Comm'n, 133 Ohio St. 212, 213-14, 12 N.E.2d 765, 768 (1938).

[47] 346 U.S. 327 (1953).

[48] *Ibid.* (Emphasis added.)

[49] *In re* Plainfield-Union Water Co., 14 N.J. 296, 303, 102 A.2d 1, 5 (1954).

[50] See Atlantic Greyhound Corp. v. Public Serv. Comm'n, 132 W. Va. 650, 670, 54 S.E.2d 169, 180 (1949).

dure was not followed in *Lakeside Truck Rental*,[51] that case underscores the necessity for reviewing courts to recognize that the decision as to whether or not an administrative agency shall rehear is a judicial function. The mandate must be more specific than the language usually used — "Reversed and remanded for proceedings in conformity with this opinion." More direction is needed: "The order of the court below is vacated, and the record is remanded to said court with direction to return it to the commission for further *hearing*, consideration, and disposition in accordance with the applicable law."[52] This language leaves no doubt as to the purpose of remand, and the administrative agency thus retains its fact-finding functions (within the substantial evidence concept) without any encroachment by the courts. More important, such an order would leave the determination of applicable law to the courts and would insure the primacy of judicial determinations over administrative orders.

Professor Kenneth Culp Davis has stated that Mr. Justice Jackson's dissent in the second *Chenery* opinion[53] "is surprising."[54] He raised the issue of whether the *Chenery* case was any different "from any other case in which an agency applies a statutory standard where it has not been applied before"[55] and went on to say that the dissent was mistakenly based on the proposition that the Commission declined to promulgate a rule.[56] Professor Davis also examined Mr. Justice Jackson's discussion of the retroactive nature of the Commission's decision and concluded that all adjudication, "judicial and administrative, involves some degree of retroactive law making."[57]

The rule-making powers of administrative agencies and the retroactive effects of commission action are not necessarily concerned with clear and concise mandates from reviewing courts to administrative bodies. It would seem that these questions would dissipate themselves if commission action had legislative sanction and, if not, most certainly by judicial review, reversal, and remand with specific instructions. The remand question does not seem to concern Pro-

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[51] Lakeside Truck Rental, Inc. v. Bowers, 174 Ohio St. 405, 189 N.E.2d 723 (1963).

[52] Pennsylvania State Athletic Comm'n v. Bratton, 177 Pa. Super. 598, 608, 112 A.2d 422, 426 (1955). (Emphasis added.)

[53] SEC v. Chenery Corp., 332 U.S. 194, 209-18 (1947).

[54] 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 17.08, at 536 (1958).

[55] *Id.* at 537.

[56] *Ibid.*

[57] *Id.* at 538.

fessor Davis, who is of the opinion that a more persuasive dissenting opinion in the *Chenery* case might have been written; he suggested that agencies give an indication of their attitudes by rule-making or by "warning through a dictum, a Commissioner's speech, a publicized letter, or a press release."[58] In raising the query whether an opinion should have been written along these lines, however, he concluded that "for the courts to hold illegal, unfair, unauthorized, or unconstitutional what are substantially the same methods of law development that are traditional in the judicial system may seem to many to be incongruous and impracticable."[59]

No one can deny that an administrative agency must necessarily consider mixed questions of law and fact in its decisions. The question of the proper procedure to be followed after remand can be no different than that faced by a lower court if Professor Davis' statement is applicable, and it is believed to be. If the comparison to a lower court is valid (and this article is not concerned with that feature), then the administrative agency should not claim to have an exclusive expertise but should be bound by the law of the case as established by a reviewing court. It is incumbent upon reviewing courts to effectuate their mandates upon remand without allowing administrative agencies to claim super-legal powers to "recast rationale"[60] and take such action as they see fit. There is no review of a reviewing court's language in the order of remand.

[58] *Id.* at 540.

[59] *Id.* at 541.

[60] SEC v. Chenery Corp., 332 U.S. 194, 210 (1947) (dissenting opinion).