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SOME PRACTICAL PROBLEMS MET IN THE TRIAL OF CASES BEFORE ADMINISTRATIVE TRIBUNALS

By RALPH M. HOYT*

WHAT ARE ADMISSIBLE MATERIALS FOR ADMINISTRATIVE DECISIONS IN QUASI JUDICIAL PROCEEDINGS?

IN dealing with the work of administrative tribunals, much difference of opinion exists as to the extent to which those tribunals are or ought to be exempt from the established procedures that apply to litigation in the courts. On the one hand we find an entirely natural tendency of the administrators themselves to regard their work as of an expert character in which the training and experience of the administrators and their staffs should be permitted to furnish many a shortcut in the ascertainment of facts. On the other hand we have the time-honored tradition of permitting every litigant to confront the witnesses who oppose him, to cross-examine them, and to know exactly what evidence is used by the tribunal in the decision of his case.

†The MINNESOTA LAW REVIEW is privileged to present in this issue a portion of the proceedings of the Institute on Administrative Law and Procedure conducted at Philadelphia in September, 1940, under the auspices of the Section on Legal Education and Admission to the Bar of the American Bar Association. Because of space limitations, it has been possible to include only a portion of the entire proceedings. Some of the subdivisions of the program were presented in the form of documented papers. Other parts were presented somewhat more informally. The selection has necessarily been made from among the written papers, although the choice has not been an easy one to make, in view of the interesting and timely quality of the entire program.—EDITOR.

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Among the subjects as to which this conflict of ideas is most pronounced are three which are to be discussed in the present paper, namely, (1) the admissibility of hearsay testimony, (2) the extent to which the administrative tribunal may take "judicial" notice of facts, and (3) the extent to which such a tribunal may make ex parte resort to staff consultations and reports. After discussing these subjects in the light of the judicial precedents bearing upon them, we shall briefly consider what remedy, if any, the parties to an administrative proceeding have if the established limitations are not observed.

I. Is Hearsay Admissible?

This question really resolves itself into two: First, may hearsay be admitted at all without the commission of reversible error? And second, if it may be so admitted can it constitute the sole support of a finding by the administrative tribunal?

For the federal judicial system, the Supreme Court of the United States has answered both of these questions in the *Consolidated Edison Company Case*[1] by holding that a finding which is unsupported by substantial evidence cannot stand; that "mere uncorroborated hearsay or rumor does not constitute substantial evidence;" but that the "mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order."

This rule was laid down in December, 1938. Just a few months previously the circuit court of appeals for the second circuit, speaking by Judge Learned Hand, had stated in the *Remington-Rand Case*[2] that while mere rumor would not support a finding, "hearsay may do so, at least if more is not conveniently available and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." The latter portion of the statement is probably about the equivalent of the Supreme Court's subsequent statement in the Consolidated Edison case that evidence, to be substantial, must be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Another case which preceded the *Consolidated Edison Case* by only a few months was the decision of the court of appeals for the District of Columbia in the *Tri-State Broadcasting Company Case,*[3]

[1]Consolidated Edison Co. v. National Labor Relations Board, (1938) 305 U. S. 197, 59 Sup. Ct. 206, 83 L. Ed. 126.

[2]National Labor Relations Board v. Remington-Rand, Inc., (C.C.A. 2nd Cir. 1938) 94 Fed. (2d) 862.

involving an order of the Federal Communications Commission. The court reversed the commission's order because of the insufficiency of its findings. In addition, the court held that the admission of certain hearsay evidence was improper, but declined to pass on the question whether that error alone would have warranted reversal. The case involved the issuance of a license to a broadcasting station in competition with one already existing. The hearsay evidence consisted of the testimony of the applicant as to his talks with a large number of people who told him that another station would be very beneficial and that they would support it financially. The court held that while the commission was not limited to the strict rules of evidence, the admission of the hearsay testimony in question was in violation of fundamental principles because it deprived the opposing party of the right to cross-examine those whose composite views the applicant was "reflecting into the record."

The case just referred to suggests a serious question, however, as to how it is possible, without some relaxation of the hearsay rule, to make proof before an administrative body of such abstract things as public desires, convenience and necessity. Questions relating to the establishment or abandonment of railroad or street railway lines, the stopping of trains at certain stations, the licensing of bus lines or broadcasting stations, and the like, are constantly coming before regulatory commissions, and the answer depends to some extent upon the feeling and reaction of the "general public." Obviously the general public cannot be put on the witness stand; yet it is desirable that information as to views held by people generally should get into the record in some manner. In these days of Gallup polls and inquiring reporters it might not be an undue straining of the hearsay rule to permit such testimony as was offered in the *Tri-State Broadcasting Company Case,* at least if it came from a disinterested source, such as a public official or a poll-taking agency. Perhaps the court's treatment of this testimony would not have been so severe if it had not come from the applicant itself. It is to be remembered also that in cases of the type now referred to, the administrative tribunal is usually exercising a power that is purely legislative—passing upon the granting or withholding of a franchise—and that where these matters are handled by the legislature itself, without the intervention

[3]Tri-State Broadcasting Co. v. Federal Communications Commission, (1938) 68 App. D. C. 292, 96 Fed. (2d) 564.

of a commission, there is no limit to the remoteness of the "testimony" that is permitted before the legislative committees.

The Supreme Court of the United States has recognized, even in a situation involving such a strictly legal relationship as that between a carrier and shippers seeking the refunding of overcharges, that some relaxation of the hearsay rule may at times be a physical necessity. In *Spiller v. Atchison, T. & S. F. R. Co.*,[4] decided twenty years ago, the court had before it an order of the Interstate Commerce Commission awarding reparations in excess of $150,000 on many thousands of carloads of cattle which had been shipped by a large number of shippers. The details of the shipments were placed in evidence by the assistant secretary of the cattle raisers' association, who had gathered the data, investigated the claims, visited some of the points of destination, and examined the records of the shippers. The circuit court of appeals held that his testimony was all hearsay and insufficient to support the commission's reparation order. The Supreme Court reversed, stating as its primary ground that the testimony had not been specifically objected to as hearsay when offered, but pointing out, in addition, that the Interstate Commerce Commission is not bound by the strict rules of evidence; that the claims had been filed with the carrier in itemized form and subject to their thorough investigation; and that the long experience of the assistant secretary of the association and the investigations carried on by him were such as to make him an expert, of whose qualifications the commission itself was the primary and virtually the sole judge. What the court was really laboring to accomplish in the *Spiller Case*, it would seem, was to hold, without actually saying it, that strict enforcement of the hearsay rule in situations of this kind is simply impossible.

In the state courts, the sufficiency of hearsay testimony to sustain an administrative finding has been both squarely denied and squarely upheld. The question has arisen most frequently in workmen's compensation cases, where it sometimes happens that the only testimony available to establish the occurrence of an industrial accident is hearsay testimony. The courts of Arizona, California, Ohio and Virginia have held that a finding of liability may rest wholly upon such testimony;[5] the courts of a long list of other states have held the contrary.[6] In the states which permit such evidence as the sole support of the finding there is usually a

[4](1920) 253 U. S. 117, 40 Sup. Ct. 466, 64 L. Ed. 810.

statutory provision exempting the commission from observing the "technical rules of evidence," and that statute is availed of by the courts as the basis for upholding the finding; but on the contrary, there are other states where, with a similar statute in force, the court has taken the position that the hearsay rule is not one of the technical rules of evidence which the commission may disregard, but "is founded upon the experience, common knowledge and conduct of mankind."[7] Probably the leading case on the point is *Carroll v. Knickerbocker Ice Co.*,[8] where the New York court of appeals in 1916 held that a provision of the workmen's compensation act exempting the board from observing common-law or statutory rules of evidence related only to the initial acceptance of the evidence by the board, not to its probative force; and that "in the end there must be a residuum of legal evidence to support the claim before an award can be made." Similarly, the United States Supreme Court in the *Consolidated Edison Case*[9] made its ruling against sole reliance on hearsay evidence in the face of a declaration in the national labor relations act that "the rules of evidence prevailing in courts of law or equity shall not be controlling."[10]

The courts which hold that hearsay may constitute the sole basis of a vital finding of fact usually take the position that the probative value of such evidence is for the board or commission to decide, and that its discretion will be upheld if not abused. The supreme court of Ohio put it this way in the *Baker Case,* cited in footnote 5 above:

"There is sound discretion vested in the board by virtue of the general code to ascertain the truth of a claim by what it considers

[5]Ocean A. & G. Corp. v. Industrial Commission, (1928) 34 Ariz. 175, 269 Pac. 77; London G. & A. Co. v. Industrial Accident Commission, (1927) 203 Cal. 12, 263 Pac. 196; Baker v. Industrial Commission, (1933) 44 Ohio App. 539, 186 N. E. 10; American Furniture Co. v. Graves, (1925) 141 Va. 1, 126 S. E. 213.

[6]Olson-Hall v. Industrial Commission, (1922) 69 Colo. 518, 205 Pac. 527; Indiana Bell Telephone Co. v. Haufe, (1924) 81 Ind. App. 660, 144 N. E. 844; Swim v. Central Iowa Fuel Co., (1927) 204 Iowa 546, 215 N. W. 603; Reeves v. Union Sulphur Co., (La. 1940) 193 So. 399; Reck v. Whittlesberger, (1914) 181 Mich. 463, 148 N. W. 247; Helminsky v. Ford Motor Co., (1933) 111 N. J. L. 369, 168 Atl. 420; Carroll v. Knickerbocker Ice Co., (1916) 218 N. Y. 435, 113 N. E. 507; Plyler v. Charlotte Country Club, (1938) 214 N. C. 453, 199 S. E. 622; Zions Cooperative Mercantile Institution v. Industrial Commission, (1927) 70 Utah 549, 262 Pac. 99; Lloyd-McAlpine Logging Co. v. Industrial Commission, (1926) 188 Wis. 642, 206 N. W. 914.

[7]Swim v. Central Iowa Fuel Co., (1927) 204 Iowa 546, 215 N. W. 603.

[8](1916) 218 N. Y. 435, 113 N. E. 507.

[9]305 U. S. 197, 59 Sup. Ct. 206, 83 L. Ed. 126.

[10]29 U. S. C. A. 160, par. (d), 29 F. C. A. sec. 160, par. (d).

reliable evidence, whether it be hearsay or otherwise. This discretion cannot be exercised in an arbitrary manner, for it then ceases to be discretion."

Two dissenting judges in the *Knickerbocker Ice Company Case* in New York similarly took the position that in view of the liberal purposes of the workmen's compensation act and the fact that it was administered by a commission experienced in weighing evidence, a finding should be permitted to rest upon hearsay "where the circumstances are such that the evidence offered is deemed by the commission to be trustworthy."

There are, however, certain types of cases coming before the administrative tribunals in which the admission of testimony that is technically hearsay is a practical necessity in the interest of saving time and effort. Such a case is the very recent one of *Solar Electric Co. v. Pennsylvania Public Utilities Commission,*[11] an electric rate case decided by the superior court of Pennsylvania in November, 1939. In that case one necessary element of the complainant's proof in his attempt to show that the local public utility was paying excessive service charges to an affiliated corporation was to establish that the two corporations were in fact affiliated. On that point the commission accepted the testimony of two investigators who had examined the books of various corporations comprising an intricate holding company system. The court upheld the admission of this testimony as against the contention that it was mere hearsay, pointing out that the investigators were placed on the witness stand and were available for cross-examination, and that the reports and records which they had consulted were all in the company's possession, so that if the conclusions of the witnesses were in any respect erroneous the company had ample opportunity to bring the errors to light.

Another type of situation in which some relaxation of the hearsay rule appears to be unavoidable is in such a complicated matter as the valuation of a public utility property, or other engineering study necessarily carried on by a whole corps of workers under the general direction of an engineer in charge. In such a case it would be a sheer waste of time to require each assistant to testify to his own small part of the work. Such a situation arose in Vermont a few years ago, and the court, in upholding the admission of the testimony of the supervising engineer as to the correctness of an exhibit embodying the work done by numerous assistants said:[12]

[11](1939) 137 Pa. Super. 325, 9 A. (2d) 447, 472.
[12]Re New England Power Corp., (1931) 103 Vt. 453, 156 Atl. 390.

"Without attempting to justify the admission of the exhibit in question on strictly legal grounds, we call attention to the fact that the exigencies of modern business have called for a liberalization of the technical rules of evidence in cases like this, and that the courts have yielded to this demand to an appreciable extent. Our own cases reflect a marked tendency to a relaxation of the hearsay rule in such circumstances as are here presented. And the question whether the person actually doing the work and making the record shall be required to attend and testify has come to be largely a question of expediency."

Summarizing the present state of the law with respect to the admissibility of hearsay testimony before the administrative tribunals, it can probably be said with safety that the mere admission of such testimony is not reversible error, but that the use of such testimony as the sole basis for a vital finding, though permitted in a small minority of states, is generally frowned upon by the state and federal courts except where the fact to be proved is of so complicated a character that some degree of hearsay testimony is practically a necessity.

II. To What Extent Is Judicial Notice by Administrative Tribunals Permissible?

Administrative tribunals are permitted as a matter of course to take judicial notice of the same facts of which the courts themselves will take notice; but the question whether they can go further and take notice of facts which are deemed to be common knowledge in their own specialized field but not generally known outside of that field, is productive of considerable controversy. On the one hand it is argued that since a tribunal of this kind is a specialist in a particular branch of human knowledge it would be a great waste of time and effort to require that the facts which are well established in that field be proved over and over again at every hearing held. On the other hand, it may be urged that the parties before such a tribunal are entitled to have the record contain all of the factual material on which the decision will rest, and not to be confronted with a decision based on some alleged knowledge of the commission gained from its previous labors in the field.

There are two kinds of subject matter that are involved in this question of judicial notice. One consists of the contents of public records, published statistics, reports on file with the tribunal itself, and the like. The other relates to the expert knowledge that the tribunal has gathered through its long experience in deciding cases in its specialized field.

As to the first type of material, the federal courts have expressed strong disapproval of the practice of deciding cases upon alleged judicial knowledge of facts vaguely referred to as being contained in the commission's report files, or in published statistics, etc. In *United States v. Abilene & S. R. Co.*[13] an order of the interstate commerce commission was held void because of the commission's use of data contained in railroad reports on file with it, no notice having been given the parties as to what particular data the commission intended to use. The court, speaking by Mr. Justice Brandeis, flatly laid down the rule that the commission in order to make use of such data must introduce into the record, "by specific reference," such parts of the reports as it wishes to treat as evidence.

Similarly, in a district court case decided in Ohio in 1928[14] it was held that a commission's finding that a gas company was paying an unnecessarily high price for its supply of natural gas could not stand if supported only by the commission's judicial notice of reports filed with it by other gas companies of the state.

The latest and most thorough discussion of this subject by the Supreme Court is in the *Ohio Bell Telephone Case*.[15] There the state commission, after the evidence was all in, had made certain reductions in the valuation of the telephone company's property on the basis of information of which it took judicial notice with respect to price trends. The Supreme Court, speaking unanimously through Mr. Justice Cardozo, said:

"An attempt was made by the commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. . . . To press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial.

"What has been done by the commission is subject, however, to an objection even deeper. [Citation]. There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to

[13](1924) 265 U. S. 274, 44 Sup. Ct. 565, 68 L. Ed. 1016.

[14]West Ohio Gas Co. v. Public Utilities Commission, (N.D. Ohio 1928), 42 Fed. (2d) 899.

[15]Ohio Bell Telephone Co. v. Public Utilities Commission, (1937) 301 U. S. 292, 300-302, 57 Sup. Ct. 724, 81 L. Ed. 1093.

find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The commission, withholding from the record the evidential facts that it has gathered here and there, contents itself in saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

On the other hand, the supreme court of Wisconsin held, more than twenty-five years ago, that the railroad commission might base its freight rate decisions upon compilations of cost data made by it from the annual reports filed by the railroads generally with the commission, without the necessity of offering the reports in evidence.[16]

Coming to the second type of judicial notice, which relates to the expert knowledge of the administrative tribunal because of its long dealing with the subject matter, the tendency of the courts has been in the direction of liberality. Thus the supreme court of Utah has held[17] that the public utilities commission of that state may, in a case involving discontinuance of a railroad line, take judicial notice of all such facts as a court would notice, and may also take notice of

"such facts and practices as are generally known throughout the whole field of railroad transportation; that is, such facts which are practically universal among operatives in the field to which the jurisdiction of the commission extends, although they may not be known to the world generally; but it cannot take its special knowledge which it may have gained from experience or from other hearings and base any findings or conclusions upon such knowledge."

The foregoing rule, it will be observed, broadens the judicial notice of the commission to the point of including matters of common knowledge in the technical field in which it operates, but without permitting it to make use of additional knowledge acquired through its own experience or through the hearing of other cases. A recent decision in the state of Washington[18] appears to

[16]Chicago North Western R. Co. v. Railroad Commission of Wisconsin, (1914) 156 Wis. 47, 145 N. W. 216, 974.

[17]Los Angeles & S. L. R. Co. v. Public Utilities Commission, (1932) 81 Utah 286, 17 Pac. (2d) 287.

[18]State v. Department of Public Service, (1939) 198 Wash. 37, 86 Pac. (2d) 1104.

carry the broadening process considerably, further, holding that a commission engaged in regulating transportation by ferryboats may take into consideration "the results of its own inspection of the physical conditions involved, results of its previous experience in similar situations, and the general information concerning the subject which goes to make up its fund of expert knowledge."

The supreme court of Wisconsin has taken a very advanced position on this subject,[19] holding that in a workmen's compensation case involving the question whether a hernia is of traumatic origin or not, the commission may decide contrary to the unanimous testimony of the expert witnesses if it knows their testimony to be untrue from its own long experience with the subject. In that connection the court said:

"Nonsense clothed in words of learned length falling from the lips of an expert witness does not afford a sufficient basis upon which to support a judgment. . . . A farmer sitting on a jury would not be bound by an opinion evidence relating to farming which he knew or believed to be untrue. Neither would a pharmacist or mechanic or physician. Why then should the members of the industrial commission be bound to accept opinions of experts which are contrary to their own knowledge and experience?"

The conclusion which seems to be justified by a study of the decisions on this subject of judicial notice is that the courts are inclined to accord to the administrative tribunals the power to take notice with respect to matters that may be termed the common knowledge of the specialized fields in which such tribunals are acting, and there is a tendency to go further and permit them to take notice of specific facts or phenomena on the basis of their own experience in the handling of similar cases. The tendency of the courts is, however, opposed to permitting these tribunals to ramble at will through their files of reports and statistics and base their findings upon such data as they may see fit to cull from those sources without notice to the parties.

III. To What Extent May Administrative Tribunals Make Ex Parte Resort to Staff Consultations and Reports?

The Supreme Court of the United States and the state courts are virtually unanimous in their condemnation of the practice, on the part of administrative tribunals, of giving consideration to evidence not contained in the official record to which all parties

[19]McCarthy v. Sawyer-Goodman Co., (1927) 194 Wis. 198, 215 N. W. 824.

have had access. The Supreme Court of the United States took a firm position on this subject commencing with the earlier cases coming to it from the interstate commerce commission. In one such case decided in 1913, where it was sought to sustain an order of the commission on the basis of information gathered outside of the hearing, the court said:[20]

"Manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute it. . . . All parties must be fully apprised of the evidence submitted or to be considered and must be given opportunity to cross-examine witnesses and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."

And in the famous case of *Crowell v. Benson*,[21] involving an order under the longshoremen and harbor workers' compensation act, the suggestion that the deputy commissioner might act upon information gathered by himself outside of the hearings was rejected, and the court, by Chief Justice Hughes, asserted that "facts conceivably known to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order."

The state courts have consistently taken the same position. Thus the supreme court of Illinois said in a railroad case in 1929:[22]

"The commissioners cannot act on their own information. Their findings must be based on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such."

In North Dakota, under a statute which provided for the holding of a hearing and then further provided that "the commissioners are empowered to resort to any other source of information available," the court of last resort held[23] that this statutory language merely authorized the commissioners, if they deemed

[20]Interstate Commerce Commission v. Louisville & Nashville R. Co., (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431.

[21](1932) 285 U. S. 22, 48, 52 Sup. Ct. 285, 291, 76 L. Ed. 598.

[22]Atchison T. & S. F. R. R. Co. v. Commerce Commission, (1929) 335 Ill. 624, 167 N. E. 831, 837.

[23]State v. Milhollan, (1923) 50 N. D. 184, 195 N. W. 292.

the record incomplete, to procure such additional evidence as might be available and to make it a part of the record, but that the decision in every case "must be based upon evidence submitted to them at the hearing or hearings, and that on appeal the validity and lawfulness of the orders must be determined by the evidence contained in the record certified to the court."[24]

The supreme court of Arizona appears to have gone further than most of the state courts in the direction of permitting the administrative tribunal to collect and scrutinize information outside of the record, although that court pays lip service at least to the doctrine that such information must not be made the basis of the decision. The question arose in a workmen's compensation case[25] in which the commission, after the close of the hearing, had its examiners make an ex parte investigation into the facts of the case and file confidential reports thereon, which the commission refused to permit the petitioner to see. The court held that the validity of the commission's award against the petitioner was not affected by this practice so long as there was in the official record competent evidence in support of the award. The court stated that the "reports of such special examiners are not themselves evidence but are merely in the nature of confidential information from which the commission may secure legal and competent evidence." This would seem to open the way to the commission to poison its mind by the reading of non-record evidence gathered in an ex parte investigation, without the slightest opportunity for the parties to refute the evidence or even know what it is. A contrary result was reached in an earlier Illinois case,[26] where the commission frankly stated in its decision that it had been unable to determine from the record testimony which way the preponderance lay, and it had sent out its agent to obtain ex parte affidavits from additional witnesses. The supreme court reversed the resulting award, stating that the parties had the right "not only to present such evidence as they may desire, but also to be present at the taking and hearing of the evidence by the opposing party so that each may have opportunity for the cross-examination of the other's witnesses." In both the Illinois and Arizona cases there

[24]See also F. W. Merrick Inc. v. Cross, (1930) 144 Okla. 40, 289 Pac. 267; Lupinski v. Industrial Commission, (1925) 188 Wis. 409, 206 N. W. 195.

[25]Simpkins v. State Banking Department, (1935) 45 Ariz. 186, 42 Pac. (2d) 47.

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

was some evidence in the official record in support of the board's decision, but the reviewing courts reached opposite conclusions as to the vitiating effect of the unofficial information collected by the investigators of the board.

It may be asked, What good are the expert engineering and accounting staffs of the public utility commissions and the trained investigators of the other administrative tribunals, if the tribunal must close its eyes and ears to the facts gathered by these experts? The answer is, that the members of these staffs have every right and opportunity to present the results of their ex parte investigations at the regular hearings, exactly like other witnesses placed upon the stand. The courts time and again have made it clear that the investigation of cases by members of a commission's staff is not under any ban whatever; what is disapproved is the use of the material gathered by these investigators without submitting it to the interested parties and offering opportunity for cross-examination and rebuttal. One of the leading decisions on this point is *Lindsey v. Public Utility Commissioners.*[27] Objection was made in that case to the commission availing itself of the services of its engineers and basing its conclusion in whole or in part upon their investigations. The court held that the commission had a right to make these independent investigations but that the parties to the proceedings were entitled to examine the engineers' report and to cross-examine its authors.

"The report being in the nature of evidence in the case is, like any other evidence, subject to analysis and impeachment, and had an application to examine the report been made and refused, or an application been made to examine the engineers and refused, this court would regard such refusal as reversible error."

But the public utility was held to have waived its rights in this regard by failing to ask for a further hearing after the report was filed, and by thereafter participating in a rehearing without paying any attention to the report.[28]

There is no legal objection, of course, to the type of staff conference which consists merely in threshing over the evidence actually in the record, summarizing the testimony of witnesses, and pointing out where the weight of the evidence lies. Work

[27](1924) 111 Ohio St. 6, 144 N. E. 729.

[28]Other cases approving the use of ex parte reports if opportunity for further hearing and cross-examination is afforded are Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., (1908) 191 N. Y. 123, 83 N. E. 693, 701; Gauthier v. Penobscot Chemical Fiber Co., (1921) 120 Me. 73, 113 Atl. 28; Lucas v. Walters Milling Co., (1935) 116 Pa. Super. 171, 176 Atl. 78.

of this type is analogous to that performed for a judge by his law clerk.[29] What we have been discussing is the placing of *additional* evidence before the tribunal by means of conferences or reports or memoranda which the parties to the proceeding are given no opportunity to know about or to refute. Judicial sanction for that type of thing appears to be almost completely lacking in this country.

IV. How May Advantage Be Taken of Prejudicial Violations of the Principles of This Subsection?

Where the prejudicial violation consists of the admission of hearsay testimony, the fact of such violation appears clearly in the record and can be assigned as error in whatever type of judicial review may be provided.

Similarly, if the finding rests on judicial notice of something that is not judicially noticeable, the violation will automatically appear from the complete absence of evidence in the record as to such fact. In either case, however, the aggrieved party can expect no relief from a reviewing court unless the error is really prejudicial, which means that the evidence improperly received or the notice improperly taken must constitute the *sole* support of an essential finding of fact. If there is any competent corroborating evidence in the record, the error in receiving hearsay or in taking judicial notice will be dismissed as immaterial, however good the basis may be for suspecting that the tribunal was led to its decision by the improper evidence rather than by the competent corroborating evidence.

As to the third subject of our discussion, namely, the use of evidence not actually made a part of the record, the remedy of the aggrieved party is usually rather illusory. Unless the administrative tribunal is frank enough to confess in its written decision that it has used evidence not appearing in the record, there is ordinarily no way for the parties to know how much information the tribunal obtained from round-table conferences with its technical staff, or what confidential reports from that staff may be lodged in the private files of the tribunal. It is generally held that the members of an administrative body cannot be called to the witness stand and cross-examined as to their processes in deciding the case,[30] so that the opportunity of the aggrieved party to bring

[29]See Morgan v. United States, (1936) 298 U. S. 468, 481, 56 Sup. Ct. 906, 80 L. Ed. 1288.

[30]Morgan v. United States, (1938) 304 U. S. 1, 18, 58 Sup. Ct. 773,

a suspected violation to the attention of a reviewing court is really very meager. In those cases in which the non-record evidence constitutes the sole basis for the finding, redress would be available anyway because of the complete absence of supporting evidence in the record, without going on to prove that non-record evidence was actually used by the tribunal. And where the non-record evidence is not the sole support of the finding—as, for instance, where a divergence exists between the expert witnesses called by the parties, and the commission's engineer has thrown the weight of his own expert opinion to one side or the other in a private report to the commission—it would seem that there is no method now known to the law by which the aggrieved party may even discover the violation, much less secure redress in a reviewing court. For that matter, however, the reluctance of the courts to permit decisions to be upset by inquiring into the mechanics of the process of decision is anciently established in the case of judges, jurors and arbitrators, and the application of the same rule to the administrative tribunals cannot justly be criticized as an innovation.

776, 82 L. Ed. 1129; Appleton Water Works Co. v. Railroad Commission, (1913) 154 Wis. 121, 142 N. W. 476.