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Interrogatories and the Administrative Process

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INTERROGATORIES AND THE ADMINISTRATIVE PROCESS

Although the work of administrative agencies has been successfully carried on for several decades, there persists, in some quarters, the belief that peculiar and sinister forces are at work in the shaping of administrative decisions. This belief is much stronger when the decision is handed down by a national administrative tribunal. Perhaps it is based on the still present fear of what Lord Hewart of Bury termed "The New Despotism," that is, the encroachments of bureaucracy.[1] The so-called mysteries of administrative judgments have been attacked in the courts in an attempt to ascertain the various mental processes preliminary to official administrative determinations. From time to time, administrative decisions will undoubtedly again be similarly challenged and opposed. It is important, therefore, to examine how the opposition to the privileged nature of preliminary administrative proceedings has fared in the courts and what results can be expected in the future.

The point of departure for this examination is the English case of *Local Government Board v. Arlidge*.[2] This case greatly influenced modern American cases which have involved a probing of the processes underlying administrative decisions. In the *Arlidge* case, the Court of Appeal had ordered the issuance of a writ of certiorari for the purpose of quashing an order of the Local Government Board. This order had dismissed the respondent's appeal from the refusal of the local authority to determine a closing order under the Housing, Town Planning, etc., Act, 1909.[3] In an appeal to the House of Lords by the Local Government Board, the order of the Court of Appeal was reversed.

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1 HEWART, THE NEW DESPOTISM (1929).

2 [1915] A.C. 120.

3 9 EDW. VII, c. 44, § 17.

The grounds upon which the writ of certiorari was sought were that the applicant had been refused an oral hearing, and that he was not permitted to see the report of the Inspector who held the necessary public local inquiry before the appeal was dismissed, and that the order did not disclose by which officer of the Board the appeal had been decided. The Court of Appeal made absolute a rule for a writ of certiorari. The House of Lords, in reversing this decision, held that when an executive department is entrusted by Parliament with judicial duties, Parliament must, in the absence of an indication to the contrary, be taken to have intended it to follow its own procedure, and though the department must act in good faith and allow a sufficient opportunity to present the case, it was not bound to employ the methods of the courts. Thus an early precedent was set for the autonomous operation of administrative tribunals in the proper exercise of their duties. Critics of this case, notably Lord Hewart, held a different view of the degree of autonomy which should properly be enjoyed by these tribunals. "The effect of the decision," Hewart stated, "seems to be that where judicial functions are vested in a Minister or Government department, parties to the proceedings have none of the securities against injustice which they enjoy in judicial proceedings before the Courts." [4] But there was no indirection in reasoning. An administrative agency had acted in good faith as it saw fit under its statutory mandate and the House of Lords saw no necessity for a disclosure of the mental processes underlying the administrative action.

In an American case decided some years later, *C. J. Tower & Sons v. United States*,[5] the court took up the matter of disclosure of the underlying bases which lead up to official administrative action. In that case Secretary of the Treasury Mellon had been questioned by written inter-

[4] HEWART, *op. cit. supra* note 1, at 167.
[5] 71 F. (2d) 438 (C.C.P.A. 1934).

rogatories as to his participation in a certain order required to be made by the Secretary, but which was alleged to have been made by one of his assistants. The Secretary said he recalled the matter in question, though not in detail, since seven years had elapsed from the time of the transaction. Further, the Secretary pointed out, it was impossible for him to remember all the facts of all the transactions of his department during that period. The court stated in its opinion that recollection of a myriad of departmental details, after seven or eight years, was not required of the Secretary.

In 1938 and 1939 there was a flurry of cases which attempted to find out the various undisclosed procedures which had been preliminary to the actual rendering of particular administrative decisions. In *National Labor Relations Board v. Biles Coleman Lumber Company*,[6] the court refused to make inquiry into the Board's procedure where there was merely an allegation on information and belief that the Board members had failed to read all of the testimony in the case or examine the exhibits; it was charged that the Board was not "competent to judicially appraise and weigh the evidence or to form a basis for the findings of fact, conclusions of law, and Order," and that the Board, in its findings, had relied on subordinate employees. The court held that there was no showing of a denial of due process. Another important case, *National Labor Relations Board v. Cherry Cotton Mills*,[7] held, however, that the court should receive evidence, in the form of depositions and answers to interrogatories which had been addressed to the members of the Board, when such evidence questioned the lawfulness of the Board's proceedings.

Again in *Cupples Company Manufacturers v. National Labor Relations Board*,[8] there was an application for a

6 98 F. (2d) 16 (9th Cir. 1938).
7 98 F. (2d) 444 (5th Cir. 1938).
8 103 F. (2d) 953 (8th Cir. 1939).

commission to take the depositions of the Board members and for an order directing them to answer certain interrogatories. The petition claimed that subordinate employees had examined the record and then submitted findings and suggestions to the Board. The court held that reliance by the Board on administrative assistance was proper, and that the allegation that the Board members, by relying on the aid of subordinates, did not consider evidence in arriving at the decision, was insufficient to justify the relief asked by the petitioners. This case set a pattern for subsequent decisions involving similar problems.[9] In another case, *National Labor Relations Board v. Botany Worsted Mills, Inc.*,[10] the court also denied a petition for the issuance of interrogatories to the members of the National Labor Relations Board. The judge in that case felt that "freedom of deliberation" by an administrative body should not be restrained in such a manner.

In the *Botany Worsted Mills* case, the judge mentioned at length authorities on the subject of the immunities of judges, juries, courts martial and other bodies from having their deliberations disclosed to public view. A well-annotated portion of the opinion in *Chicago B. & Q. Ry. v. Babcock* [11] is noteworthy in this connection:[12]

> When we turn to the evidence there is equal ground for criticism. The members of the board were called, including the Governor of the State, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the board were not entitled to the possibly higher immunities of a judge. Buccleuch v. Metropolitan Bd. of Works, L.R. 5 H.L. 418,

9 See also: Ford Motor Co. v. N.L.R.B., 114 F. (2d) 905 (6th Cir. 1940), *cert. denied*, 312 U.S. 689, 61 S. Ct. 621, 85 L. Ed. 1126 (1941); Bethlehem Shipbuilding Corp. v. N.L.R.B., 114 F. (2d) 930 (1st Cir. 1940); Inland Steel Co. v. N.L.R.B., 105 F. (2d) 246 (7th Cir. 1939).

10 106 F. (2d) 263 (3d Cir. 1939).

11 204 U.S. 585, 27 S. Ct. 326, 51 L. Ed. 636 (1907).

12 204 U.S. at 593.

> 433. Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. Mattox v. United States, 146 U.S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50. So, as to arbitrators. Buccleuch v. Metropolitan Bd. of Works, L.R. 5 H.L. 418, 457, 462. Similar reasoning was applied to a judge in Fayerweather v. Ritch, 195 U.S. 276, 306, 307, 49 L. ed. 193, 213, 214, 25 Sup. Ct. Rep. 58. A multitude of cases will be found collected in 4 Wigmore on Evidence, §§ 2348, 2349. All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law. See Coulter v. Louisville & N. R. Co., 196 U.S. 599, 610, 49 L. ed. 615, 618, 25 Sup. Ct. Rep. 342; Central P. R. Co. v. California, 162 U.S. 91, 107, 108, 117, 40 L. ed. 903, 908, 909, 16 Sup. Ct. Rep. 766, 105 Cal. 576, 594, 38 Pac. 905; State Railroad Tax cases, 92 U.S. 575, 23 L. ed. 663; Cleveland C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 542, 18 L.R.A. 729, 33 N.E. 421. In Fargo v. Hart, 193 U.S. 490, 496, 497, 48 L. ed. 761, 764, 24 Sup. Ct. Rep. 498, there was no serious dispute as to what was the principle adopted.

The holding of a New York case states very plainly that an arbitrator, who is a quasi-judicial officer, cannot be compelled to testify as to the reasons for his decision.[13] The justification for this ruling is aptly discussed in a brief note in a law journal, where it is stated:[14]

> . . . and the rule is established that *no* court may, upon motion to vacate, review the administrators' findings of law or facts. These involve matters of judgment only and to permit a court to interfere with them would substitute the court's judgment for that of the arbitrators. It is obvious that if arbitrators could be compelled to testify as to the reasons for their decision and as to the method by which they arrived at an award, a path would be paved for the court to consider the merits of the award contrary to the established rule. In order to avoid this result the courts have held that in such a proceeding an arbitrator can neither volunteer nor be constrained to produce evidence that would impeach his award. . . .

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13 Shirley Silk Co. v. American Silk Mills, Inc., 257 App. Div. 375, 13 N.Y.S. (2d) 309 (1939).

14 17 N.Y.U.L.Q.Rev. 659 (1940).

This reasoning is quite applicable to cases where the courts refuse to permit the probing of administrators' minds for the underlying reasons for their decisions. In one such case, *United States v. Standard Oil Company of California et al.*,[15] the court stated, in discussing the subject of interrogatories for discovery of the undisclosed processes leading up to administrative determinations:[16]

> Nor will the courts inquire into the "extent of his [referring to the Secretary of the Interior] investigation and knowledge of the points decided, or as to the methods by which he reached his determination." De Cambra v. Rogers (1903) 189 U.S. 119, 122, 23 Sup. Ct. 519, 521, 47 L. Ed. 734. The defendants allege, upon information and belief, that the decision of the Secretary was not made or based upon the Secretary's own knowledge or consideration of the record. In view of the presumption of regularity which attaches to the acts of administrative tribunals, especially those of quasi-judicial power, these allegations do not plead any issuable facts.

The judicial attitude expressed by the federal court in this case was a stronger pronouncement of what was said by the Supreme Court as far back as 1882, when it decided the case of *Steel v. St. Louis Smelting Company*.[17] Years later, in a case involving railroad rates, the Supreme Court indicated that there was no change in its attitude:[18]

> The report shows that the commission [referring to the Interstate Commerce Commission] received much evidence bearing upon the standards set by § 15(6) to govern it in making the divisions. Appellants' claim that the order rests exclusively upon the southern lines' financial needs is negatived by the record. Many other facts were shown to have been presented and considered. There is no requirement that the commission specify the weight given to any item of evidence or fact *or disclose mental operations by which its decisions are reached.* Useful precision in respect of either would be impossible. And it would be futile upon the record to attempt

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15 20 F. Supp. 427 (S.D. Calif. 1937).

16 *Id.* at 448.

17 106 U.S. 447, 1 S. Ct. 389, 27 L. Ed. 226 (1882).

18 Baltimore & O. R. Co. v. United States, 298 U.S. 349, 359, 56 S. Ct. 797, 80 L. Ed. 1209 (1936).

> definitely to ascertain the weight assigned to any fact or argument in prescribing the divisions. We find no support for appellants' claim. (Emphasis supplied.)

The case of *Great Northern Railway Company v. Weeks*[19] presents another example of judicial adherence to the principle that administrators and administrative bodies should be protected in the proper exercise of their duties. In this case it was held that in determining whether a tax assessment was arbitrarily made and grossly excessive, the assessors could not be compelled to submit to examination as to the operation of their minds in making it. The court noted, in part:[20]

> No testimony was given by the tax commissioner or any other member of the board. They could not be compelled to submit to examination as to the operation of their minds in making the challenged assessment.

On the principle that such information was confidential, and properly withheld, a producer who protested a decrease in tariff rates on imported articles was refused the opportunity to take the testimony of Tariff Commission members for the purpose of showing whether any other information was conveyed by the Commission to the President, except that stated in the report and findings.[21] In yet another case, *Norwegian Nitrogen Products Company v. United States*,[22] a refusal by the Tariff Commission to disclose certain costs was considered a proper exercise of its discretionary powers in view of the confidential nature of the information.

Another federal court case is worthy of mention at this point. In *Brinkley v. Hassig*,[23] the administrative right to render decisions without fear that they will be impeached in a subsequent proceeding was upheld. The circuit court stated very plainly that:[24]

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19 297 U.S. 135, 56 S. Ct. 426, 80 L. Ed. 532 (1936).

20 297 U.S. at 145.

21 Union Fork & Hoe Co. v. United States, 86 F. (2d) 423 (C.C.P.A. 1936).

22 288 U.S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933).

23 83 F. (2d) 351 (10th Cir. 1936).

24 *Id.* at 358.

> Findings of administrative tribunals, like verdicts of juries, cannot be overturned by a dissection of the mental processes by which the result is reached, as long as it is reached from a consideration of substantial evidence produced at the hearing. The trial court would have been well within its power if this minute exploration of the mental reactions of the members of the board to particular items of evidence had been drastically curtailed.

The case which finally, as Professor Gellhorn notes, "put at rest the question of whether the mental processes of an administrative tribunal are to be probed in later court proceedings" [25] was *United States v. Morgan*,[26] called *Morgan IV*. Here the Supreme Court sustained on all counts an order of the Secretary of Agriculture. With respect to the alleged impropriety of the Secretary's conduct of the proceedings which had resulted in the issuance of the order, Mr. Justice Frankfurter, speaking for the Court, said:[27]

> . . . the short of the business is that the Secretary should never have been subjected to this examination [referring to the examination by the lower court]. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding" . . . Such an examination of a judge would be destructive of judicial responsibility . . . Just as a judge cannot be subjected to such a scrutiny . . . so the integrity of the administrative process must be equally respected.

It is of interest to note Mendelson's comment on the decision in the *Morgan* case with regard to the examination of the Secretary:[28]

> Thus succinctly was terminated the threat which has hung over the administrative process since the first Morgan decision. But methodologically that threat was abolished in exactly the same manner in which it originated; namely, by analogy to the judicial process. This in itself should be a sufficient condemnation of such reasoning as a method of

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25 GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS 702 (2d ed. 1947).

26 United States v. Morgan, 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429 (1941). *Morgan IV* came back to the Supreme Court five years after *Morgan I* was decided.

27 313 U.S. at 422.

28 Mendelson, *Some Administrative Implications of the Morgan Decisions*, 30 KY. L. J. 408, 415 (1942).

determining the propriety or impropriety of administrative procedures.

It would appear that the threat has lately been removed insofar as federal administrative bodies are concerned. But in the state courts the situation is still confusing. In *State* ex rel. *Madison Airport Company v. Wrabetz*,[29] it was held that since a failure by the Industrial Commission of Wisconsin to consider the evidence presented before a trial examiner in a workmen's compensation case would invalidate the order, it was proper that a court should inquire into the regularity of the Commission's proceedings by taking evidence thereon in a suit to set aside an award. Also, it was essential that *all* Commissioners review the record in the case. In *Joyce v. Bruckman*,[30] it was held that *all* the members of the State Liquor Authority must read and appraise the record of the case. Another Wisconsin case [31] determined that it was improper to question an administrative tribunal as to the course of its deliberations in order to impeach its decision. The court noted that this was a rule "founded on good sense and public expediency. . . ." [32] Further, it was stated that:[33]

> The idea is that there should be no possibility of the overturning of a judgment or final determination of a controversy which has been reached after fair trial and hearing by reason of the fact that one of the body which rendered the judgment at some later period, either honestly or dishonestly, or from mere failure of memory, impeaches the result by testifying to some defect in the mental operations of himself or his fellows, or to a mistaken view of the legal principles applicable to the case. Important decisions of this kind cannot be upset or discredited in this manner, if they are to be of any value. . . .

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29 231 Wis. 147, 285 N.W. 504 (1939).

30 257 App. Div. 795, 15 N.Y.S. (2d) 679 (1939).

31 Appleton Waterworks Co. v. Railroad Commission, 154 Wis. 121, 142 N.W. 476 (1913).

32 154 Wis. at 143.

33 *Ibid.*

Conclusion

Vom Baur in his excellent book on administrative law states that: "The reports and orders of an agency ordinarily constitute the only authoritative evidence of its action." [34] Thus, it would appear that the official record would speak for itself. And, under the decisions of the Supreme Court and the federal courts, discussed in this article, it would seem that an examination could not be had on an administrative agency's deliberations leading up to its decision. Furthermore, it would seem that evidence of deliberations prior to the decision would be barred by the parol evidence rule, if the reasoning of Mr. Wigmore in the analogous problem involved in jury deliberations is to be accepted.[35] If the authenticity of the record in official files is called into question, officers and employees having knowledge of the matter could be required to testify as to the correctness of the record.[36] However, that is an entirely different situation from one where interrogatories are posed for discovery of mental processes underlying administrative decisions.

In a note in one of the prominent law reviews, written in connection with the *Cherry Cotton Mills* case, there is an interesting discussion, as follows, of the pro and con of interrogatories:[37]

> One may reasonably argue in this case that the board's function would be so seriously hampered by subjecting it to such interrogatories that, as a matter of policy, the courts should refuse to grant them. The act empowers the board to become a litigant in the United States courts; does this mean that the board assumes the character of an ordinary litigant so that it should not be given special consideration? The courts may well treat the board with some deference, it being an arm of the government, seeking to enforce the law. If this view be adopted, does the power to issue interrogatories arise from necessity? One may say, on the other hand,

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34 I VOM BAUR, FEDERAL ADMINISTRATIVE LAW 444 (1942).

35 8 WIGMORE, EVIDENCE § 2348 (3d ed. 1940).

36 Blair v. Oesterlein Co., 275 U.S. 220, 48 S. Ct. 87, 72 L. Ed. 249 (1927).

37 37 MICH. L. REV. 1121, 1123 (1939).

> that it is wiser to protect litigants from the chance of irregularity, and create no presumption in favor of the board.

And further on the discussion continues:[38]

> It would certainly be "necessary" for the court to have power to issue interrogatories if this policy were adopted, i.e., inquiring into the board's treatment of facts. Little authority has been found for the use of such interrogatories.

A note in the *Harvard Law Review* states, in part, that: [39]

> Short of an extended inquiry into mental processes, there appears to be no manner of establishing with certainty that written argument ever reached the deciders.

These views were expressed in articles written after most of the cases which now form the law were decided. Consequently, they may be considered as interesting legal criticisms in no wise affecting the legal principles governing interrogatories addressed to administrative tribunals and their officials.

In his discussion of the immunities of the President and high executive officials, Professor Corwin in his recent revised book on the Presidency, says:[40]

> Here, of course, the question at issue was whether the Supreme Court could require an official to answer, but the doctrine stated is equally applicable to the case of an investigation by a Congressional Committee. This doctrine is that a high executive official is not bound to divulge matters regarding which he is a confidant of the President. *At the same time the Court impliedly claims the right to say finally whether such a plea on the part of an official is a valid one.* (Emphasis supplied.)

Despite the Supreme Court's pronouncement in the *Morgan* case that "the integrity of the administrative process must be respected" and that the administrative process must be protected from undue scrutiny, it would appear that the Court is not yet ready to relinquish completely its control over the preliminary phases of administrative de-

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38 *Id.* at 1124.

39 See Note, 52 HARV. L. REV. 509, 513 (1939).

40 CORWIN, THE PRESIDENT: OFFICE AND POWERS 138 (3d ed. 1948).

terminations. Quite possibly there may be another flurry of cases seeking to question the motives behind administrative determinations such as occurred in the years 1938 and 1939. This time the administrative arm is strengthened by a number of favorable judicial decisions. But it should be remembered that the administrative tribunals must still depend on the courts for protection in such discovery proceedings.

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