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Administrative Law—Judicial Enforcement of Administrative Adherence to Self-enacted Procedural Rules.—*Elmo Div. of Drive-X Co. v. Dixon*

Gerald E. Farrell

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CASE NOTES

Administrative Law—Judicial Enforcement of Administrative Adherence to Self-enacted Procedural Rules.—*Elmo Div. of Drive-X Co. v. Dixon*.¹—In 1952, Rule V(f) of the Federal Trade Commission's Rules of Practice provided for a reopening procedure whereby the Commission could set aside a consent settlement only after finding a change of law or fact, or that the public interest required. This rule was incorporated in a consent settlement with appellant. Subsequently, the Commission instituted a new complaint against appellant which dealt with the same matters as the 1952 consent settlement. Appellant claimed that by ignoring Rule V(f), the Commission had caused substantial prejudice to its business and reputation and would subject it to a full-scale trial twice on the same charges. It sought declaratory and injunctive relief in a federal district court. The court dismissed for lack of jurisdiction. On appeal, HELD: Reversed. The complaint states a claim that the district court must entertain. Incorporation of the rule into the consent decree gives rise to an enforceable right in the appellant to require the Commission to abide by the rule. Moreover, the institution by an agency of rules governing procedure may prevent deviation from them as long as they remain in effect.

Both procedural and substantive rules are properly made by an independent agency within the limits set by statute. The distinction between the two types of rules is one of *how* as versus *what*.² It is only the *how* that concerns us here. These rules fill in the procedural spaces purposely left by congressional legislation, facilitating and regularizing procedure in fields where acts of a given nature constantly recur.³

When these rules are applied in a role essentially judicial in nature, reviewing courts have often held agencies to a species of equitable estoppel—and have produced a result similar to that attained under *res judicata* principles.⁴ On occasion, however, courts have chosen not to hold an administrator to his previously chosen standard.⁵ In general, the line has been drawn with

¹ 348 F.2d 342 (D.C. Cir. 1965).

² Glaser, *Administrative Procedure* 11 (1941).

³ Many jurists have spoken out on the importance of procedure. Mr. Justice Douglas: "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951). "The history of American freedom is, in no small measure, the history of procedure." *Malinski v. New York*, 324 U.S. 401, 414 (1945). Mr. Justice Jackson: "Procedural fairness and regularity are of the indispensable essence of liberty." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953). Mr. Justice Frankfurter: "The history of liberty has largely been the history of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943).

⁴ *United States ex rel. Ohm v. Perkins*, 79 F.2d 533 (2d Cir. 1935); *Cooper, Administrative Agencies and the Courts* 242 (1951). The agencies themselves seem to recognize that a prior determination will not be reversed to the detriment of an individual who fairly relied on an earlier ruling. See *Baltimore Transit Co.*, 47 N.L.R.B. 109 (1943).

⁵ *United States ex rel. Minuto v. Reimer*, 83 F.2d 166 (2d Cir. 1936); *Board of Tax Appeals v. United States ex rel. Shults Bread Co.*, 37 F.2d 442 (D.C. Cir. 1929);

a crooked ruler, as are most lines that must come between competing interests. In every case, as in the present, the public has an interest in effective administration, while the individual wishes to be free from repeated litigation.⁶

Only a few cases during the nineteenth century dealt with the question of whether an agency was required to follow its procedural rules. All were of the opinion that an agency could ignore, modify, or repeal any regulation or custom at will, as long as no valuable property right was impaired.⁷ To determine whether such a right had been impaired, the reasoning and policy which presumably led the administrator to adopt the procedure was closely scrutinized by the courts.⁸ As late as the early 1930's it was believed that flexibility of procedure—especially when the proceedings were being conducted by laymen—was desirable.⁹

This flexibility prompted a reaction during the latter part of the decade. Unchecked procedures had brought a sense of confusion into the entire administrative process, and the elements of fairness were believed to be too frequently absent.¹⁰ About 1938, spurred by an antagonism to the powers exercised by regulatory agencies, the bar as a whole sought to impose the strict rules of traditional judicial procedure on the agencies.¹¹ A compromise resulted in the Administrative Procedure Act of 1946, section 3 of which required publication of procedural rules in the *Federal Register*.¹² The act was passed in the hope of regularizing procedure, and section 3 in particular was meant to enable practitioners before the commissions to become familiar with the rules that would govern proceedings. Nowhere in the act, however, is there a requirement that an administrator always follow the rules currently in effect. In fact, finding the current rules among the thousands of pages of the *Federal Register* is thought to be an impossible task by many who have attempted to do so.¹³ Therefore, it cannot be said that the act in any way answers the question dealt with here.

Emil Denmark, Inc., 2 F.C.C. 474 (1936); System Fed'n No. 6 v. Chicago, R.I. & P. Ry., 2 N.R.A.B. 178 (1937); Baitinger Elec. Co. v. Forbes, 170 Misc. 589, 10 N.Y.S.2d 924 (Sup. Ct. 1939); Gillis v. Public Serv. Comm'n, 105 Pa. Super. 389, 161 Atl. 563 (1932); cf. Consumers Power Co. v. NLRB, 113 F.2d 38 (6th Cir. 1940).

⁶ Cooper, op. cit. supra note 4, at 247.

⁷ Bernard v. Ashley, 3 Fed. Cas. 272 (No. 1346) (C.C.D. Ark. 1853), aff'd, 59 U.S. (18 How.) 43 (1855).

⁸ Germania Iron Co. v. James, 89 Fed. 811 (8th Cir. 1898).

⁹ Landis, Report on Regulatory Agencies to the President-Elect 15 (1960).

¹⁰ Ibid.

¹¹ Id. at 16.

¹² Administrative Procedure Act § 3(a)(2), 60 Stat. 238 (1946), 5 U.S.C. § 1002(a)(2) (1964). The section states:

Every agency shall separately state and currently publish in the Federal Register . . . (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations. . . .

Concerning the section, Representative Walter of Pennsylvania noted during debate of the bill: "[T]he public information requirements of section 3 are among the most important and useful provisions of the bill." Administrative Procedure Act, 1944-46, Legislative History 356 (1949).

¹³ Vanderbilt, Administrative Procedure: Shall Rules Before the Agencies Be Uniform?, 34 A.B.A.J. 896 (1948). The Chief Justice noted:

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Lack of statutory authority has not deterred the judiciary from solving the problem on its own. When adherence is to be enforced, however, courts of today act on grounds different from the former valuable property right basis. A rule is mandatory, according to a modern court, because it has "the force and effect of law,"¹⁴ while customs also call for compulsory conduct in order to insure a uniformity of treatment to the general public.¹⁵ A 1954 Supreme Court opinion states that as long as a procedural rule remains in effect, it cannot be sidestepped.¹⁶ In 1957, the Court noted that as long as regulations remain unchanged, proceeding without regard to them will not be allowed.¹⁷ In 1959, Mr. Justice Frankfurter, speaking for himself and three other justices, wrote:

An executive agency must be rigorously held to the standards by which it professes its action to be judged. . . . Accordingly, if dismissal from employment is based on a defined procedure even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. . . . This *judicially evolved rule of administrative law* is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.¹⁸ (Emphasis added.)

These cases, in addition to the present decision, would seem to settle the issue. Yet there are those cases which ignore the agency's disregard of its

For when the procedures of nearly a hundred federal agencies are not only meaninglessly diverse but changed week by week, enlightened only by the feeble glow of the *Federal Register*, clients and lawyers alike can have only an imperfect knowledge and no practical certainty of the ways of federal regulatory agencies.

Id. at 898.

¹⁴ Blackly & Oatman, Federal Regulatory Action and Control 65 (1940). See *Yakus v. United States*, 321 U.S. 414, 435 (1944); *Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942); *United States v. Grimaud*, 220 U.S. 506 (1911); *Sibray v. United States ex rel. Plichta*, 282 Fed. 795, 798 (3d Cir. 1922); *United States ex rel. Chin Fook Wah v. Dunton*, 288 Fed. 959 (S.D.N.Y. 1923); *Edwards v. Guthner*, 106 Colo. 209, 103 P.2d 6 (1940). And see *Boske v. Comingore*, 177 U.S. 459 (1900), where Mr. Justice Harlan noted:

Those who insist that such a regulating is invalid must make its invalidity so manifest that the court has no choice except to hold that the Secretary has exceeded his authority and employed means that are not at all appropriate to the end specified in the act of Congress.

Id. at 470.

¹⁵ But see *Baintinger Elec. Co. v. Forbes*, supra note 5.

¹⁶ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); see *Bridges v. Wixon*, 326 U.S. 135, 151-53 (1945); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *Boske v. Comingore*, supra note 14.

¹⁷ *Service v. Dulles*, 354 U.S. 363, 388 (1957).

¹⁸ *Vitarelli v. Seaton*, 359 U.S. 535, 546-47 (1959) (citations omitted). The same rationale appeared in an earlier Frankfurter opinion, *SEC v. Chenery Corp.*, 318 U.S. 80 (1943):

Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

Id. at 87.

rules, noting this to be "a mere technical defect"¹⁹ which should be overlooked because it affects no substantial right. Still other decisions are consistent with the view that prejudice rather than mere departure from the rules must be shown.²⁰ A 1953 Eighth Circuit opinion clearly states the basis of these cases:

It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party. . . . The Board acts in the public interest and not in vindication of private rights Its discretion is not to be controlled at the whim of a private party. . . .²¹

In other words, the courts have not found it necessary or desirable to force administrative adherence to all regulations or customs. Usually, the rule is branded as procedural, capable of being ignored or modified as long as no party to the proceeding is placed in a disadvantageous position.²² An analogy is often drawn to the rules of courts; the quasi-judicial nature of the administrative actions and the desirability of attaining the ends of justice are stressed to strengthen the analogy.²³ The rationale of the courts is not surprising in view of the general trend away from technicalities that today marks trial proceedings.²⁴ If the courts themselves are to be freed from the minutiae of

¹⁹ *Olin Indus., Inc. v. NLRB*, 192 F.2d 799 (5th Cir. 1951), cert. denied, 343 U.S. 919 (1952).

²⁰ *Federal Broadcasting Sys. v. FCC*, 225 F.2d 560 (D.C. Cir. 1955); *NLRB v. National Container Corp.*, 211 F.2d 525, 534 (2d Cir. 1954).

²¹ *NLRB v. Monsanto Chem. Co.*, 205 F.2d 763, 764-65 (8th Cir. 1953). The same court, in an earlier decision, *NLRB v. Grace Co.*, 184 F.2d 126 (8th Cir. 1950), rejected the claim that an existing administrative rule had not been followed thusly: "[It] is a procedural rule which the Board in its discretion may apply or waive as the facts of a given case may demand. . . . The Board is not the slave of its rules." *Id.* at 129.

²² *NLRB v. Grace Co.*, *supra* note 21; *NLRB v. J.S. Popper, Inc.*, 113 F.2d 602 (3d Cir. 1940). See Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 *Yale L.J.* 1 (1925), where Mr. Chief Justice Taft said: "A complaining litigant in the Federal courts . . . must always be ready to point to the clause of the Federal Constitution and the statute by which he may rightly invoke the consideration of the court." *Id.* at 11.

²³ *NLRB v. Monsanto Chem. Co.*, *supra* note 21.

²⁴ Lehman, *Technical Rules of Evidence*, 26 *Colum. L. Rev.* 509, 511 (1926); McCormick, *Tomorrow's Law of Evidence*, 24 *A.B.A.J.* 507, 512 (1938); Wigmore, *Appendix to ALI Code of Evidence* 112 (Tent. Draft No. 1, 1940). But see Greenleaf, *Evidence* 730 (16th ed. 1899).

This trend is manifested in many ways. It can be observed from the frequency with which courts, after holding an original decision invalid, remand the case for further consideration by the agency, rather than making a final decision, and the tendency to treat as issues of fact what might be considered issues of law. See, e.g., *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945). It can also be seen in the suggestion in some cases that judicial review should not be granted except as required by statute. See, e.g., *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943).

rules to which they were bound in former days, equal or greater freedom for the agencies would be a reasonably expected result.

Looking historically at the question, when courts first began to review agency determinations, a reversal was based on faulty administrative fact-finding. Courts were not unconscious of the fact that the agencies were taking over in areas formerly within their control;²⁵ and under the guise of constitutional and statutory interpretation, administrative decisions were overturned in an attempt to embarrass and undermine the new agencies.²⁶ Now, as a look at the cases will show, it has become quite fashionable to give deference to administrative fact-finding. According to one commentator, judges appear to have simply shifted the attack upon the agencies to equitable estoppel, due process, and other grounds of law.²⁷

The proponents of judicial review of procedure state that the administrative tribunal has an interest in the result of cases pending before it and that such interest often affects the fairness of the hearing. They believe that if the agency had its way, lawyers would not be allowed to represent their clients at hearings,²⁸ and all determinations would be made from evidence received off the record.²⁹ Opponents of such review question the action of the courts on the grounds that the administrators are just as expert in the procedural matters which concern their commissions—more so than the judges sitting in review—and maintain that deference should be given on this as well as on substantive fact-finding.³⁰

Between the two extremes there exists at present a middle ground which is probably the result of a realization that too rigid an application of the doctrine prohibiting disregard of procedural rules would encourage the tendency of some agencies to proceed without rules or lead to rules so vague that it would be impossible to show a violation.³¹ Beyond that, control of discretion is not typically a judicial function, nor is there proof that anything is to be gained from favoring the discretion of a judge over that of an administrator. The discretion which the agencies are exercising is that which was delegated to them by the Legislature. It is the Legislature which can amend the laws which established and which affect the agencies. It is the Legislature which periodically passes upon the appropriation bills that provide the bureaus with their operating funds. It is the Legislature which must give its advice and consent on important appointees to agency positions. Therefore, according to the middle view, the answer is that the problem is fundamentally political and best solved by the Legislature rather than the courts.³²

The proponents of review, then, seemingly emphasizing their suspicion

²⁵ Landis, *The Administrative Process* 123 (1938).

²⁶ *Ibid.*

²⁷ Jaffe, *Judicial Control of Administrative Action* 565 (1965).

²⁸ Cooper, *op. cit. supra* note 4, at 21.

²⁹ Pound, *Administrative Law* 68-73 (1942); American Bar Ass'n, *Reports of Special Committee on Administrative Law*, 64 A.B.A. Rep. 575 (1939) and 63 A.B.A. Rep. 331, 346 (1938); see *American Drug Corp. v. FTC*, 149 F.2d 608' (8th Cir. 1945).

³⁰ Jaffe, *op. cit. supra* note 27, at 566; see Treves, *Administrative Discretion and Judicial Control*, 10 *Modern L. Rev.* 276 (1947).

³¹ Cooper, *op. cit. supra* note 4, at 289.

³² *Id.* at 345.

of agency aims, urge that it is most desirable that the courts continue to scrutinize closely the records of administrative actions where rules have been ignored, for hiding behind a "mere" procedural error may be a substantial injustice. In rebuttal, from the agencies' view, it is admitted that the judiciary has done much to discourage the ignoring of regulations and customs. While this is not necessarily to be faulted, the nature of the administrator's duties and the vast volume and complexity of the business which he faces require that he retain some discretion if substantial justice is to be done. The establishment of all-embracing and uniformly applicable regulations will not insure this. The real question should always be whether or not due process has been done. It is submitted that in the future an appellant should not be allowed to avail himself of even the most flagrant disregard of procedural rules unless he can also show that the procedural error caused him injustice.³³

GERALD E. FARRELL

Antitrust—Antitrust Civil Process Act—Investigation of Premerger Activities.—*United States v. Union Oil Co.*¹—Union Oil Co. filed a petition to set aside a Civil Investigative Demand issued by the Department of Justice pursuant to the Antitrust Civil Process Act (ACPA).² The demand requested documents relating to an investigation of "proposed acquisitions of fertilizer companies by petroleum companies" for the purpose of "ascertaining whether there is or has been a violation of"³ Section 7 of the Clayton Act.⁴ The dis-

³³ *Morgan v. United States*, 304 U.S. 1, rehearing denied, 304 U.S. 23 (1938); see *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926), where Mr. Justice Stone, speaking of due process, said:

Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it.

Id. at 42.

¹ 343 F.2d 29 (9th Cir. 1965).

² 76 Stat. 548 (1962), 15 U.S.C. §§ 1311-14 (1964).

³ Part of the demand was reproduced in a footnote in the opinion, the relevant portions of which are set forth herein:

You are hereby required to produce . . . the documentary material in your possession, custody or control described on the attached schedule

This civil investigative demand is issued pursuant to the provisions of the Antitrust Civil Process Act . . . in the course of an inquiry for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15 United States Code Sec. 18 [Clayton Act, Section 7] by conduct of the following nature: *The proposed acquisitions of fertilizer companies by petroleum companies.*

Attached was a schedule of documents:

1. Each survey, study, report or other writing prepared or used by the corporation, its officers, directors or employees, which refers or relates to the maintenance or improvement of the corporation's position in the fertilizer market, including each such document relating to any acquisition, merger, sale of assets, or consolidation consummated or considered by the corporation.

Supra note 1, at 30 n.1.