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DELAY IN REVIEW OF INITIAL DECISIONS: THE CASE FOR GIVING MORE FINALITY TO THE FINDINGS OF FACT OF THE ADMINISTRATIVE LAW JUDGE*

GEORGE ERNEST MARZLOFF**

Introduction

Two major criticisms of regulatory agencies today are the delay that often occurs at the top level in the making of even routine decisions and the inadequate attention given to the development of significant regulatory policy. Both problems stem in part from the absence of specific authority in organic statutes or the Administrative Procedure Act to delegate final decision-making authority in routine cases to administrative law judges or intermediate boards subject only to discretionary or other types of limited review by the agency head(s).¹ The general rule is that the head of the agency or its members must consider on the merits any appeal from initial decisions. Often this appeal takes the form of a *de novo* review followed by a lengthy written decision on the merits which often repeats at length the findings of fact and conclusions made by the Administrative Law Judge (ALJ) and affirms the initial decision. The results in agencies with large caseloads are decisional delay at the top and a reduction of time agency members have to consider more complex cases or policy issues.²

William Warfield Ross, Esq., described the problem as follows:

At present, a typical adjudication is heard by an ALJ, who renders an initial decision. [In most agencies,] [p]ractically all such decrees go to a commission or administrator for a final decision. The result is a backlog of cases which are routine but nonetheless must be finally decided by the agency itself. In addition to causing delay, this process tends to prevent agency members from giving necessary attention [either] to complex individual cases . . . [or] to major policy questions. To deal with this problem some agency members assign their personal staffs the task of screening and effectively deciding many routine cases: an off-the-record process inconsistent with the quasi-judicial model contemplated by the [APA].³

* This paper was submitted to George Washington University in partial satisfaction of the requirements for the degree of Master of Laws in Administrative Law: Economic Regulation.

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¹ The CAB and the Federal Maritime Commission do have authority to implement discretionary review.

² S. REP. NO. 94-1258 [accompanying S. 796, 94th Cong., 2d Sess. (1976)].

³ *Hearings on H.R. 10194 and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 37 (1975) (statement of William W. Ross).

Congress and legal commentators have traditionally approached this problem by calling for legislation authorizing agencies to establish intermediate review boards or authorizing discretionary review of initial decisions. Neither the Congress nor the commentators have concentrated on the avenues available for alleviating the problem under the present statutory scheme absent amending legislation. This article will examine the extent to which agencies may, under the present APA, limit the scope of their review of initial decisions *without* depriving litigants of their APA right to file exceptions. A statistical analysis of case histories of the Civil Aeronautics Board, which has a certiorari system of review, will demonstrate that discretionary review is, in practice, granted in 83 percent of the cases requested, a clear indication that discretionary review does not necessarily result in a substantial or even significant reduction in the cases to be decided on the merits of the agency's uppermost level.

Additionally, statistical data for the FCC's review board indicates that intermediate review boards result in additional delays to litigants and still require at least a summary review by the agency's members. Moreover, recent removal from review board jurisdiction to presiding officer jurisdiction of certain matters, coupled with staff reductions and membership reduction at the review board, evince a certain level of dissatisfaction by the agency members with the effectiveness of the review board approach. The writer will propose a third alternative which preserves a litigant's right to file exceptions to the initial decisions with the agency members, thus assuring ultimate decision-making responsibility by the agency members. Moreover, the writer's proposal eliminates the facade of calling the review discretionary when it is granted in nearly all cases. The author's proposal, briefly stated, calls for the adoption of a system of mandatory appellate review in which the relationship on appeal between the Law Judge and the agency is similar to the relationship between trial court and court of appeal. The essence of the proposal is that findings of fact by the Law Judge would not be set aside unless clearly erroneous, as is the practice under Federal Rule of Civil Procedure 52(a). Time savings would result from the agency's giving only a cursory or summary review to exceptions to findings of fact instead of the extensive *de novo* review now undertaken.⁴

A. Review Boards and Discretionary Review—The Need for Statutory Authorization

When the discussion of means to reduce decision-making delays at administrative agencies arises, usually the creation of an intermediate appellate review board or the institution of a system of discretionary review

⁴ A recent Senate study has urged Congress to enact legislation allowing each agency to provide that all decisions would become final unless reviewed by the agency in its discretion and to enact legislation authorizing agencies to establish appellate review boards. *Study on Federal Regulation prepared pursuant to S. Res. 71, Committee on Governmental Affairs, U. S. Senate, Delay in the Regulatory Process, Volume IV* (1977).

by the agency members is suggested as the avenue for reducing top-level decisional delay. Statutory authorization is required for implementation of either alternative for all agencies subject to the Administrative Procedure Act. This article will treat the relative merits of the two approaches and suggest a third alternative.

APA Authority to Use Discretionary Review

Any discussion of discretionary review authority in the APA must focus exclusively on sections 8(a) and (b)⁵ of the Act. Section 8(a) provides in pertinent part:

On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.⁶

The legislative history of section 8 does not support the proposition that when Congress authorized agencies to limit the issues on appeal it intended thereby to permit agencies to implement discretionary review of initial decisions. Section 8(b) provides that on agency review of a decision of subordinate employees "parties are entitled to a *reasonable opportunity to submit . . . exceptions to the decision*" and "supporting reasons for the *exceptions*"⁷ (emphasis added). However, no provision of the Act specifically states that an agency *shall* review the decisions of its subordinates. Thus it may be argued that the reasonable opportunity to submit exceptions to the initial decision prior to decision upon agency review afforded by section 8(b) is guaranteed only if the organic statute imposes an obligation to review.⁸

The absence of a stated right of appeal is reasonably explained when one considers the examiner-agency relationship prior to enactment of the APA. Then, a hearing examiner typically rendered a "recommended" decision which was automatically reviewed by the agency members in the normal course of business. The thrust of the APA and its predecessor, the vetoed Walter-Logan Act, was to enhance the position of the hearing examiner by giving more weight to his decision. "Its purpose is to make the hearing officer . . . an important factor in the decision process."⁹ Thus the APA contains a provision that in the absence of an appeal of an initial decision or review by the agency on its own motion the decision of the examiner becomes the final decision of the agency.¹⁰ Prior to the APA,

⁵ 5 U.S.C. § 557(b) and (c) (1970).

⁶ 5 U.S.C. § 557(b) (1970).

⁷ 5 U.S.C. § 557(c)(2) & (3) (1970).

⁸ Auerbach, *Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners*, 48 MINN. L. REV. 823, 854 (1964). Professor Auerbach then proceeds to dismiss this argument without mentioning whether there was any authority for the position.

⁹ 92 CONG. REC. 5653 (1946) (remarks of Rep. Walter during House debates on the APA).

¹⁰ 5 U.S.C. § 557(b) (1970).

agencies customarily reviewed de novo the recommended decisions of their examiners.¹¹ Since review had been customary, it would be unreasonable to assume that by omitting a reference to a right of appeal Congress thereby intended to prohibit such a right. A more reasonable view would be that in drafting these provisions of the APA Congress was attempting to focus affirmatively on the status of the hearing examiner. The fact that the efforts of Congress were so directed toward one aspect of administrative adjudication that the other aspect was not expressly incorporated within the APA should not be interpreted as a renunciation of the right to appeal by omission but rather as a belief that a statutory expression of the right of appeal would be purely superfluous in view of the long standing customary, automatic agency review. Even more convincing evidence that the Congress intended a right to appeal an initial decision is the following language from the explanation of the terms of the bill during House debate on the bill:

The second subsection of section 8 is a statutory statement of the right of the parties to submit . . . exceptions to recommended decisions or other decisions being appealed or reviewed administratively.¹²

In addition to consideration of the APA, the agency's organic statute must be examined to determine whether discretionary review may be employed. Thus, assuming one could successfully overcome section 8 of the APA, the organic statute could still prevent discretionary review. Such is the case at the Federal Communications Commission. Section 409(b) of the Communications Act specifically provides that any party to an adjudicatory proceeding " . . . shall be permitted to file exceptions and memoranda in support thereof to the initial . . . decision, which shall be passed upon by the Commission or by the [Review Board]."¹³ Parties thus have not only the right to file exceptions but to have those exceptions considered by the Commission or the Review Board. Thus, the Act seems inconsistent with a system of discretionary review which, to be effective, must restrict the scope of review, require appeal to be by petition for review rather than by exceptions, and eliminate the necessity to "pass on" every point made by the appellant.¹⁴

¹¹ 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 10.03 (1958).

¹² Statement of Mr. Walter 92 CONG. REC. 5653, (1946); see note 7 *supra*. These words were spoken by Congressman Walter of Pennsylvania and are therefore entitled to great weight when one attempts to determine the legislative intent of the Act. Mr. Walter had been intimately involved with revision of the then existing federal administrative procedure provisions. Mr. Walter had earlier co-authored the Walter-Logan bill, the immediate forerunner of the APA. Although passed by the Congress the bill was vetoed by President Roosevelt who preferred to await the Report of the Attorney General's Committee. ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, REPORT OF THE ATT'Y GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941).

¹³ 47 U.S.C. § 409(b) (1970).

¹⁴ REPORT TO THE CHAIRMAN OF THE FEDERAL COMMUNICATIONS COMMISSION FROM THE TASK

Additionally, a system of discretionary review would be conceptually and logically incompatible with the Review Board as it now exists.¹⁵ At the FCC, parties have a right to file exceptions to an initial decision with the Review Board¹⁶ and then to seek review of the Review Board decision through an application for review with the Commission.¹⁷ If the Review Board were to rule on a petition for certiorari, an aggrieved party could file an application for review of the Board's action.¹⁸ Yet the Commission's review on applications for review is discretionary. Thus the illogical anomaly: discretionary review of discretionary action. The solution would require granting finality to Review Board decisions to deny review of initial decisions which would remove the ultimate responsibility for Commission decisions from the Commissioners, appointed by the President and confirmed by the Senate, a result heretofore not palatable to the Congress. The other alternative would be abolition of the Review Board.¹⁹

APA Authority to Adopt a Review Board

It is doubtful that agencies need new statutory authority in order to create intermediate appellate review boards; however, they do need it in order to decline appeals from decisions of such boards.²⁰ The reasoning already discussed with regard to why agencies could not institute, without statutory authorization, discretionary review of initial decisions would also apply to review of intermediate decisions. Section 8 of the APA²¹ guarantees dissatisfied litigants the right to have their cases considered by the agency members. The following pertinent language from section 8(b) makes this abundantly clear:

Before a . . . decision . . . of subordinate employees [becomes final], the parties are entitled to a reasonable opportunity to submit . . . exceptions to the decisions . . . of subordinate employees²²

FORCE ON ADJUDICATORY REREGULATION at 78, July 18, 1975 [hereinafter cited as TASK FORCE REPORT].

¹⁵ Before the Commission could implement certiorari review, it would have to obtain enabling legislation either in its organic statute or in the APA which would supersede the organic statute.

¹⁶ Exceptions cannot be filed in those cases, such as broadcast license revocation, where the Commission has not delegated review authority to the Board. 47 U.S.C. § 155 (d)(9) (1970). Exceptions in these cases are filed directly with the Commission.

¹⁷ 47 U.S.C. § 155(d)(4) (1970).

¹⁸ 47 C.F.R. § 1.115 (a) (1976).

¹⁹ TASK FORCE REPORT, *supra* note 14 at 79.

²⁰ ADMINISTRATIVE CONFERENCE REPORT ON ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT, 93d Cong., 1st Sess. 7287, 9291 (1973). Agencies may create review boards because the APA permits agencies to delegate decision-making authority [to subordinates] 5 U.S.C. § 556(c)(8), appointed in accordance with 5 U.S.C. § 3105, 5 U.S.C. § 556(b)(3).

²¹ 5 U.S.C. § 557 (1970).

²² 5 U.S.C. § 557(c) (1970).

In the 94th Congress, at the recommendation of the Administrative Conference of the United States, a bill was introduced to amend the APA to give agencies the authority but not the obligation to establish intermediate boards and discretionary review of initial decisions.²³ No action was taken on the bill although it was reported favorably by the Senate Judiciary Committee. A similar bill has been introduced into the 95th Congress.²⁴

Subsequent sections of this article will be devoted to analyzing individually and comparatively the desirability and efficiency of a review board and of discretionary review. It suffices at this point to state in conclusion that statutory authorization is required for either.

B. Review Boards

Agencies presently using intermediate appellate review boards have established them pursuant to special statutory authorization. Major agencies having review boards include the Interstate Commerce Commission,²⁵ the Federal Communications Commission,²⁶ and the Nuclear Regulatory Commission.²⁷

ICC Review Boards

In 1961, the ICC, by amendment to the Interstate Commerce Act, was authorized to establish review boards whose decisions would constitute final agency action under the APA.²⁸ The ICC proceeded to establish three boards—one to serve each of the agency's three divisions.²⁹ The boards generally consider cases submitted on exceptions or by stay of the lower proceeding, although the commission has reserved certain of the more important cases for its own consideration.³⁰ The decision of a review board is subject to discretionary review by the corresponding division of the

²³ S. 796, 94th Cong., 1st Sess. (1975); see also accompanying report: AGENCY APPEAL BOARDS AND SUBPOENA POWER, S. REP. NO. 94-1258, 94th Cong., 2d Sess. (1976). S. 796 was introduced by Senator Kennedy for himself and Senator Mathias on February 22, 1975. 121 *Cong. Rec.* 2416 (daily ed.).

²⁴ H.R. 3563, 95th Cong., 1st Sess. (1977).

²⁵ 49 U.S.C. § 17 (5) (1970).

²⁶ 47 U.S.C. § 155 (d)(1), (8) (1970).

²⁷ 42 U.S.C. § 2241 (1970). No data pertinent to this paper was available on the performance of the review board (Atomic Safety and Licensing Appeal Panel) at the Nuclear Regulatory Commission.

²⁸ Pub. L. No. 87-247, 75 Stat. 517, (codified at 49 U.S.C. § 17(5) (1970)).

²⁹ Note, *Intermediate Appellate Review Boards for Administrative Agencies*, 81 *HARV. L. REV.* 1325, 1330 (1968) [hereinafter cited as *Appellate Review Boards*], citing Kahn, *Reorganization of the ICC—1961*, 29 *ICC PRAC. J.* 586, 595 (1962) and Hutchinson, *Improving Commission Organization and Procedure—Some New Developments*, 32 *ICC PRAC. J.* 134, 136 (1964).

³⁰ For an example of board review see the grant of authority to the Finance Review Board in 1961, permitting it to consider applications of carriers to merge, consolidate, control, purchase or lease carrier properties only in cases where the operating revenues of the carriers did not exceed one million dollars. *Authority Delegated to Finance Review Board by ICC*, 29 *ICC PRAC. J.* 608 (1962).

agency but the decision of that division is final and not subject to review by the full agency.³¹

Preliminary data on the boards' operations were received quite favorably by the commissioners.³² One commissioner commented that the boards had disposed of cases in one-third the time the commission would have taken had it been required to place them on its overburdened docket.³³ More recent detailed data is unavailable.

Any in-depth examination of review boards must focus on the prototype of review boards—the FCC Review Board. The FCC Review Board functions as a good working model of the review board concept. Further, the FCC has compiled extensive data on its Board's performance which provide the basis for a realistic evaluation of its performance.

FCC Review Board

On August 31, 1961, the Commission was authorized by an amendment to the Communications Act to delegate review functions in cases of adjudication to a board consisting of three or more employees.³⁴ Prior to this amendment the Commission was required by law to review all initial decisions where exceptions were filed.³⁵ This law was designed to permit members of the Commission to devote more time to matters of policy and planning and the more significant adjudicatory cases by expediting the final disposition of "routine" adjudications.³⁶

On June 6, 1962, the Commission established the Review Board by rule and order.³⁷ The Review Board exercises authority in adjudicatory hearing cases only and has no responsibility for the formulation of general communications policy.³⁸ The Board has been delegated authority to review initial decisions of Administrative Law Judges in all adjudicative proceedings except for proceedings involving renewal or revocation of station licenses in the Broadcast Services or the Common Carrier Services.³⁹ With regard to this gap in Review Board jurisdiction, the author agrees with the commentator who has stated:

³¹ Appellate Review Boards *supra* note 29, at 1330.

³² *Hearings on S. 518 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., 163, 166-70, 179-80. (Statement of ICC Vice Chairman Paul J. Tierney).

³³ STAFF OF THE SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., QUESTIONNAIRE SURVEY ON DELAY IN ADMINISTRATIVE PROCEEDINGS 127, 133 (1966) (Statement of ICC Chairman John J. Rush).

³⁴ Pub. L. No. 87-192, 75 Stat. 420 (codified at 47 U.S.C. § 155(d) (1970)).

³⁵ FCC REVIEW BOARD PROGRESS REPORT, April 1965, at 1 [hereinafter cited as PROGRESS REPORT].

³⁶ *Id.*; H.R. REP. NO. 723, 87th Cong., 1st Sess. 1 (1961); S. REP. NO. 576, 87th Cong., 1st Sess. 5 (1961).

³⁷ 47 C.F.R. §§ 0.361-0.365 (1976).

³⁸ PROGRESS REPORT, *supra* note 35, at 2.

³⁹ 47 C.F.R. § 0.365 (a) (1976).

The creation of this exception to Review Board's jurisdiction cannot be justified on principle. The task of review in these cases is not distinguishable from that involved in cases presently entrusted to the Review Board. The 'life-or-death' interests concerned would better be served not by removing these cases from the jurisdiction of the Review Board but rather by providing for their mandatory review by the Commission after Review Board consideration.⁴⁰

Until recently,⁴¹ the Board considered interlocutory appeals from evidentiary rulings of ALJ's and rulings on petitions to amend applications, petitions for time extension and petitions to reopen the record.⁴² The Board also lost its *original* authority in two areas of interlocutory rulings,⁴³ where the Commission had earlier concluded that uniform rulings were of special importance and should, therefore, be entrusted to the capable hands of the Board alone and not to the presiding Law Judge.⁴⁴

In arriving at its decisions the Board is required to follow the provisions of the Communications Act of 1934, as amended,⁴⁵ rules and regulations, case precedent, and established policies of the Commission.⁴⁶ Although only the Commission may formulate new policy and the Board is required by rule to follow established policy and precedent, the Board nevertheless retains a certain amount of discretion to interpret established Commission policy in a given situation. A litigant may file an application for review of a final Board decision with the Commission.⁴⁷ The application shall specify with particularity the factor(s) which warrant the Commission's consideration of the questions presented.⁴⁸ Among the factor(s) to be specified are:

- (i) The Board's findings are not supported by substantial evidence in the record as a whole;
- (ii) the Board's decision involves prejudicial errors of substantive or procedure law;

⁴⁰ Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546, 550 n.24 (1969) [hereinafter cited as Freedman].

⁴¹ See *Adjudicatory Re-regulation Proposals*, 58 F.C.C. 2d 865 (1976).

⁴² 47 C.F.R. § 0.365(c), *repealed*, effective July 1, 1976; see also *Progress Report*, *supra*, note 35, at 3.

⁴³ Before the 1976 rule amendments, the Board had original jurisdiction over petitions to amend the issues upon which the case was designated for hearing and joint requests filed by broadcast applicants for the approval of agreements removing a conflict between their applications.

⁴⁴ PROGRESS REPORT, *supra* note 35, at 3.

⁴⁵ 47 U.S.C. §§ 35-609 (1970).

⁴⁶ 47 C.F.R. § 0.361(d) (1976).

⁴⁷ 47 U.S.C. § 155(d)(4) (1970).

Whenever the Commission determines that a matter pending before the Board involves a novel or important issue of law or policy, it may, on its own motion, by the vote of a majority of the members then holding office, direct that any matter before the Board be certified to the Commission for decision.

47 C.F.R. § 0.361(c) (1976). The Commission, however, will not entertain a petition that a particular matter be certified. *Id.*

⁴⁸ 47 C.F.R. § 1.115(b) (5) (1976).

- (iii) the Board's decision is arbitrary or capricious;
- (iv) the Board's decision conflicts with Commission policy; or
- (v) the Board's decision raises a novel or important issue of law or policy which warrants Commission review.⁴⁹

The Commission grants the application, in whole or in part, or denies it, usually without specifying reasons.⁵⁰ The denial of an application for review elevates the Board decision to the status of a Commission decision.⁵¹

Appraisal of the Overall Performance of the Review Board

During the first few years of its operation the Review Board was considered a success by the Commission. In its 1965 Progress Report the Commission stated:

As of December 31, 1964, the Review Board has been functioning for 29 months. In our judgment, it has well served the purposes for which it was established, and substantial benefits to the Commission and to parties to Commission proceedings have accrued from its operations.⁵²

During fiscal year 1961, before the Review Board had been created, the Commission required an average time of 262 days from the date on which the initial decision was issued to dispose of an appeal of the initial decision of a hearing examiner. By comparison, the Review Board during the first 29 months of its existence, required an average time of 172 days to dispose of the same appeal—an average saving of about three months per proceeding. With regard to interlocutory matters the Board was able to save about one month per case.⁵³

During fiscal year 1965, the average length of time to dispose of an appeal from an initial decision was 228 days; during fiscal year 1966, 267 days; during fiscal year 1967, 244 days; and during fiscal year 1968, 210 days.⁵⁴ Thus, experience in the years immediately subsequent to the Progress Report was not as favorable as the years on which the Progress Report was based.

A more recent evaluation of the Board's performance is found in the Report to the Chairman of the Federal Communications Commission from the Task Force on Adjudicatory Reregulation (1975).⁵⁵ That report states

⁴⁹ *Id.*

⁵⁰ 47 C.F.R. § 1.115 (g) (1976).

⁵¹ 47 U.S.C. § 155(d)(3) (1970). The filing of an application for review is a condition precedent to judicial review of any order. 47 U.S.C. § 155(d)(7) (1970).

⁵² PROGRESS REPORT, *supra* note 35, at 5.

⁵³ Freedman, *supra* note 40, 555-56; *see also* PROGRESS REPORT, *supra* note 35, Tables No. 1, 2, and 3.

⁵⁴ Freedman, *supra* note 40, 555-56. Freedman explains these fluctuations as the result of coincidence with the enlargement of jurisdiction of the Board and of sufficient staff assistance.

⁵⁵ TASK FORCE REPORT, *supra* note 14.

that exceptions were filed in 48 percent of the cases in which initial decisions were issued in 1971, 1972, and 1973. The Review Board took an average of 350, and a median of 356, days from issuance of the initial decision to issue a decision on exceptions while the Commission took an average of 382, and a median of 347, days to issue a decision in the renewal and revocation cases⁵⁶ in which it issued a decision on exceptions.⁵⁷ A realistic appraisal of the expedition of the Review Board must necessarily consider the time taken by the Commission to issue a ruling on applications for review of Board decisions. In 1971, 1972, and 1973, applications for review were filed in 52 percent of the cases in which the Board issued a decision. The Commission then took an average of 248, and a median of 227, additional days from the Review Board decision to issue a ruling.⁵⁸

The irony of the establishment of the Review Board as a time saving device is well described by the following statement from the Task Force Report:

Thus, the Review Board takes about as long to issue a decision as does the Commission. But when the time consumed in consideration of applications for review is added to the equation, it takes much longer to obtain a final judicially reviewable decision in the "routine" cases handled by the Review Board than in the "difficult" renewal and revocation cases reviewed directly by the Commission.⁵⁹

The preceding discussion suggests that the FCC Review Board cannot be justified solely or even primarily as a time-saving device. However, other factors incapable of statistical measurement have been suggested which indicate that the Board serves a useful purpose. First, by virtue of delegations made to the Board in hearing proceedings, the Commission is able to devote a significantly larger portion of its time and energies to major matters of policy and planning and to cases of adjudication involving issues of general communications importance.⁶⁰ The Task Force Report concluded that:

Not only has the Board saved the Commission a substantial amount of time it would otherwise have devoted to oral arguments, but the reduction in the Commission's appellate responsibilities

⁵⁶ These cases are at least as complex, if not more so, than the cases on which the Board's statistics were based.

⁵⁷ TASK FORCE REPORT, *supra* note 14, at 89.

⁵⁸ *Id.* Thus when an application for review was filed it took an average of 639, and a median of 618, days from issuance of an initial decision in which to obtain a final Commission ruling ripe for judicial review. The figures would have been even worse save for the fact that fourteen applications for review were still pending before the Commission on January 1, 1975, when the Task Force study closed. Those applications for review had been pending before the Commission an average of 304 and a median of 290, days.

⁵⁹ *Id.* at 90.

⁶⁰ See PROGRESS REPORT, *supra* note 35, Table 4; TASK FORCE REPORT, *supra* note 14, at 92.

has resulted in concomitant savings in time that would have been spent in preparation for oral argument, deliberation and adoption of a final opinion.⁶¹

Second, because their responsibilities are limited to adjudicatory hearing cases, the members of the Board are able to devote a greater degree of personal attention to cases than individual commissioners can because of the Commissioners' numerous other responsibilities.⁶² Members can devote more time prior to oral argument to becoming familiar with the facts and pleadings of a proceeding, thus making oral argument more valuable. In addition, a Board member signs each opinion and exercises his responsibility for its preparation by drafting it himself or closely supervising its preparation by a Board staff member. And, because their responsibilities are limited to adjudicatory hearing cases, individual members are able to devote time to the preparation of individual opinions.⁶³ Third, as senior staff personnel with extensive experience, Review Board members are often more familiar than the Commission with the minor issues which prove significant in Commission proceedings. This familiarity results in high quality decisions by the Board.⁶⁴

When the supposed advantages of the Board are carefully scrutinized, however, it appears that they do not countervail the extended additional delays involved in proceedings before the Board. Thus, while it is claimed that the Board permits greater devotion to policy and planning matters by the Commission, this salutary effect is not really the result of the presence of the Board but the result of a reduction of appellate responsibilities for the Commission. Thus, a different system which provided for a similar reduction in Commission appellate responsibilities *without* the need for a Review Board would, by its nature, have advantages over the present system.⁶⁵

Although Board members can devote more personal attention to case preparation and opinion drafting than Commissioners, it does not follow that Commissioners routinely devote little or no time to case preparation and opinion drafting. Moreover, the Commission has a large staff at its disposal. Not only does each Commissioner have an engineering assistant

⁶¹ TASK FORCE REPORT, *supra* note 14, at 92.

⁶² During the 29-month period immediately preceding the establishment of the Review Board the Commission devoted 45 days or partial days and 130 hours to oral arguments; during the first 29 months of Board operation the Commission spent only 29 days or partial days and 81 hours in oral arguments.

⁶³ PROGRESS REPORT, *supra* note 35, at 5.

⁶⁴ One result is that decisions of the Review Board typically meet rather than avoid complex issues and support their conclusions with reasoning and relevant authority. Changes of position are not "slipped into an opinion in such a way that only careful readers would ever know what happened, without articulation of reasons, and with the prior authorities not overruled," as Judge Friendly complained of a series of FCC opinions. Freedman, *supra* note 40, at 553-54.

⁶⁵ For a discussion of two systems which reduce agency appellate responsibilities without use of Review Boards, see Section C *infra* (discretionary review as used by, for example, the Civil Aeronautics Board); Section D *infra* (mandatory appellate review).

and one or more legal assistants but the Commission has the Office of Opinions and Review,⁶⁶ whose sole purpose is to advise the Commission on adjudicatory matters which includes preparation of a case summary for the Commissioners prior to oral argument and drafting of a tentative draft decision following Commission voting and instructions. This Office, whose sole responsibility is to the Commissioners and which performs no duties other than adjudicatory advisement, supplies needed continuity and substantial agency experience⁶⁷ so necessary to a Commission with such frequent turnover of members. Although this Office prepares the draft decision, nevertheless, in cases based on exceptions to initial decisions, each decision is drafted under the supervision of one of the Commissioners. Once a decision meets with his satisfaction, it is circulated to other Commissioners and the final product results from a procedure similar to the one used at the Review Board.⁶⁸ Because of the numerous sources of input to the decision, there is no reason to believe that Commission decisions are inferior to Board decisions.

Thus, it does not appear that the proclaimed advantages of the Review Board justify its existence, given the delay involved in Board proceedings. Moreover, even the Commission now appears to have serious doubt as to the continued usefulness of the Board.⁶⁹

C. Discretionary Review

In addition to the establishment of a Review Board, the implementation of discretionary review by the agency of initial decisions is often suggested as a means of shortening decision-making time. The Ash Report on regulatory agencies cited the disadvantages of the individual case approach as being: (1) the appropriate degree of deference is not accorded to the findings and conclusions of the presiding officers; (2) attention and resources are diverted from comprehensive and anticipatory policy making; (3) individual litigants often incur costs which should more appropriately fall on the public generally; (4) overjudicialization of the agency review process has a debilitating effect on the administrative mechanism; and (5) it leads to institutional decision making in which staff personnel must be prepared to justify any outcome by the reviewing authority.⁷⁰ Discretionary review has often been suggested as a solution to many of these problems.

Under a discretionary or "certiorari" review system a party aggrieved

⁶⁶ 47 C.F.R. § 0.171 (1976).

⁶⁷ The aggregate years of agency experience of the senior staff members of the Office of Opinions and Review compares very favorably with that of the members of the Review Board.

⁶⁸ PROGRESS REPORT, *supra* note 35, at 5.

⁶⁹ The Board membership was recently reduced from four to three and the number of authorized staff from twenty-two to eleven. BROADCASTING, December 20, 1976, at 28.

⁷⁰ The President's Advisory Council on Executive Organization, A NEW REGULATORY FRAMEWORK—REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES, 49-50 (1971) [hereinafter cited as ASH REPORT].

by an initial decision would file an application with the Commission based on one or more stated grounds. The reviewing authority would then determine whether review of the case should be undertaken. If review was granted, the parties would be permitted to file further briefs and a decision on the merits would ultimately be issued. If review was denied, an order would issue briefly stating the reasons for disallowing the appeal.

Discretionary Review at the CAB

Reorganization Plan Number 3 of 1961, authorized the Civil Aeronautics Board "to delegate . . . any of its functions to a division of the Board, an individual Board member, a hearing examiner or an employee or employee board . . ." ⁷¹ Although this statute authorized the CAB to establish an intermediate appeals board, such as the Review Board at the FCC, the CAB opted for a discretionary review procedure similar to the certiorari procedure of the Supreme Court of the United States. ⁷² The essential parts of this procedure were:

- (a) a delegation of authority to the hearing examiner to make the final agency decision following the hearing; ⁷³
- (b) a provision that review of initial decisions is not a matter of right but of sound discretion of the Board; ⁷⁴ and
- (c) a provision specifying limited grounds on which petitions for review may be filed. ⁷⁵

The grounds upon which a petition for discretionary review may be filed at the CAB are similar to the grounds upon which an application for review of an FCC review board decision may be filed: ⁷⁶

- (a) a finding of a material fact is erroneous;
- (b) a necessary legal conclusion is without governing precedent or is a departure from or contrary to law, Board rules or precedent;
- (c) a substantial and important question of law, policy or discretion is involved; or
- (d) a prejudicial procedural error has occurred. ⁷⁷

With respect to the discretionary review procedures, the Ellis Report stated:

[The] new procedure was intended to give the Board the flexibility to lighten its case load and expedite its proceedings by allowing an examiner's decision to become the final decision of the Board

⁷¹ Plan No. 3 of 1961, 75 Stat. 837, 5 U.S.C. § 133z-15 (Supp. IV, 1962).

⁷² E. Ellis, REPORT IN SUPPORT OF DISCRETIONARY REVIEW OF DECISIONS OF PRESIDING OFFICERS at 156 [hereinafter cited as ELLIS REPORT].

⁷³ 14 C.F.R. § 302.27 (1977).

⁷⁴ 14 C.F.R. § 302.28(a) (1) (1977).

⁷⁵ 14 C.F.R. § 302.28(a) (2) (1977).

⁷⁶ See text accompanying note 49, *supra*.

⁷⁷ See note 37 *supra*.

without further proceedings where it is well reasoned and based on the evidence of record or not controversial, and where review is warranted, by limiting issues on review to those which are really important and controversial.⁷⁸

Statistical Appraisal

The Ellis Report compiled a statistical comparison of decision-making time at the CAB between the period before the adoption of discretionary review, July 1958 through February 1962, and the period comprising the remainder of 1962 through the first nine months of 1969, when the discretionary review procedures were in effect. Although the CAB, its staff and its hearing examiners seemed overwhelmingly to approve of the discretionary procedures, the Ellis Report was the first attempt to analyze the results in statistical form.⁷⁹ Board data forming the basis of the Ellis Report indicates that the cases tried under the old system took an average of 213 days between initial decision and final Board decision. Under the discretionary review procedures the Board required 163 days between initial decision and final decision, or an average saving of 50 days per case. Before the rule, only 28 percent of the cases to which the rule would have applied were concluded in 100 days and only 49 percent were concluded within six months. After the rule, the Board was able to complete over half of the same type of cases in 100 days or less and almost two-thirds in six months or less. Where the Board, acting under the new rule, denied the petition for review of the initial decision, there was an average time of 56 days between initial decision and the order denying the petition for review⁸⁰ compared to an average of 281 days per case where review was granted and a decision on the merits was rendered.⁸¹

The Report concluded that "[s]ubstantial time savings have resulted from the use of the discretionary review procedure . . . and that the CAB rule has been an effective tool for the CAB, one which could have similar value to some other agencies."⁸² However, when certain statistics in the Ellis Report are examined with statistical data compiled by the CAB Advisory Committee, subsequent to the Ellis Report, discretionary review *as actually practiced* at the CAB has not only not been a time-saving device in recent years, but has resulted in delays far greater than thos experi-

⁷⁸ ELLIS REPORT, *supra* note 72, at 157.

⁷⁹ ELLIS REPORT, *supra* note 72, at 159.

⁸⁰ Ellis is especially impressed with this 56-day figure because under the old procedure 10 days would have been allowed for exceptions, 30 days for filing briefs, and at least 10 to 15 days before oral argument would be heard, for a total of 50 to 55 days. Therefore, a comparison between the old and new systems reveals that by the time the parties would have been making oral arguments under the old system, under the new system they had already received a final agency decision ripe for review in cases when the petition for review of the initial decision had been denied.

⁸¹ ELLIS REPORT, *supra* note 72, at 160-62.

⁸² *Id.* at 163.

enced prior to the adoption of discretionary review.⁸³ While the Ellis Report concluded that discretionary review had reduced the *average* days from initial decision to final Board decision from 213 to 163, the report's data revealed that during the first nine months of 1969, which were the last nine months of the period covered by the study, the average number of days from initial decision was 257 days—44 days longer than the 213 average days prior to adoption of discretionary review and 94 days longer than the 163 average days following adoption of discretionary review.

More recent data is no less disconcerting for discretionary review advocates. An update on the Ellis Report covering the period from October 1969 through June 1975 showed that the percentage of cases in which full review was granted had risen from 48 percent to 83 percent and the average number of days from initial decision to final decision had risen from 163 to 256 days.⁸⁴ The CAB Advisory Committee offered the following as an explanation:

Although these results are doubtless affected by the presence of a number of complex rate proceedings and the relative paucity of route proceedings during the period, the Committee has concluded that *the Board has been making insufficient use of its power to terminate the proceeding without full Board review where no important issues are at stake.*⁸⁵ (emphasis added).

The emphasized portion of the above statement focused directly on the intrinsic difficulty with discretionary review: the inherent reluctance of a Board member to deny full Board review. By granting review in 83 percent of its cases the Board has distorted beyond recognition the entire concept of discretionary review to the point where it may be fairly stated that the Board has practically established a right to review.

Although both discretionary review at the CAB and the Review Board at the FCC were initially touted as worthwhile time-saving devices, extended experience with both has demonstrated that in practice neither appears to reduce the time between initial decision and final agency decision ripe for judicial review.

D. Review of Initial Decisions

On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.⁸⁶

Interpreting the above portion of section 8 of the APA to mean that an agency loses no power of decision by using administrative law judges, the

⁸³ REPORT OF THE CIVIL AERONAUTICS BOARD ADVISORY COMMITTEE ON PROCEDURAL REFORM (1975) at 10-11.

⁸⁴ *Id.* at 11-12.

⁸⁵ *Id.* at 12.

⁸⁶ 5 U.S.C. § 557(b) (1970).

courts have consistently held that on appeal of an initial decision the agency members may make findings of fact contrary to those made by the presiding judge.⁸⁷ However, the right to differ is not unqualified.

Although neither the APA nor its legislative history expressly explains why ultimate adjudicative authority rests in the agency members, the legislative history does offer some insight: "[b]y enacting this bill the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure."⁸⁸ This statement reflects Congress' desire that agency members appointed by the President and confirmed by the Senate always bear the ultimate responsibility for all agency actions. Thus, in theory, agency decisions will not be made by anonymous civil servants who are not responsible to the elected representatives of the people.

Prior to the passage of the APA, decisions of examiners did not automatically become final in the absence of an appeal; agencies reviewed their examiners' decisions as a matter of course. Not only was an agency permitted to make its own findings and conclusions on the evidence but the Supreme Court held that it was obligated to do so and could not simply adopt the findings and conclusions of its examiner.⁸⁹

Thus, by the time Congress considered the APA, the principle that agencies bore the ultimate responsibility for decisions was so firmly entrenched in the administrative process that the APA draftsmen saw no need to offer a detailed explanation as to why this principle was carried forth in the APA.

Judicial Review of Agency Decisions *Reviewing Initial Decisions*

Following the conclusion of the hearing and submission of proposed findings of fact and conclusions of law by the parties, the presiding administrative law judge renders an initial decision which must include a statement of his findings and conclusions and the reasons or basis therefor on all the material issues of fact, law, or discretion presented in the record and the appropriate rule, order, sanction, relief or denial thereof.⁹⁰ Presumably, the requirement to identify and separate the findings of fact from the

⁸⁷ FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974); Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB, 466 F.2d 380 (D.C. Cir. 1972); Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); Sign and Pictorial Union Local 1175 v. NLRB, 419 F.2d 726 (D.C. Cir. 1969); Hanly v. SEC, 415 F.2d 589 (2d Cir. 1969); Persian Gulf Outward Freight Conference v. FMC, 375 F.2d 335 (D.C. Cir. 1967); Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Comm'n, 357 F.2d 632 (6th Cir. 1966); Glosson Motor Lines, Inc v. United States, 271 F. Supp. 467 (M.D.N.C. 1967).

⁸⁸ S. REP. No. 752, 79th Cong., 1st Sess. 31 (1945).

⁸⁹ Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

⁹⁰ 5 U.S.C. § 557(c) (1970).

conclusions of law is intended to facilitate judicial review where the scope of review differs between the two.⁹¹

It has been said that the function of judicial review is not to insure the wisdom of the administrative action⁹² but to correct errors of law.⁹³ Thus, it is not surprising that reviewing courts have traditionally been very reluctant to reverse findings of fact made by an agency, relying on the principle that Congress did not intend a substitution of judicial discretion for administrative discretion.⁹⁴ It is necessary to present a brief summary of the principles governing judicial review of agency decisions because it is the courts who ultimately determine the scope of an agency's review of the Administrative Law Judges' initial decisions.

The findings of the agency must be accepted by the reviewing court if there is substantial evidence on the record considered as a whole to support them.⁹⁵ Where a review of the record presents the possibility of drawing two inconsistent inferences from the evidence, the agency may draw either.⁹⁶ If the inference drawn is supported by substantial evidence, it cannot be set aside by the reviewing court even though the court would draw the other inference.⁹⁷ The presiding officer's decision is part of the record⁹⁸ and must be considered by the agency along with the evidence on which it was based.⁹⁹ The agency's departures from the Law Judge's findings are vulnerable if they fail to reflect attentive consideration to the Law Judge's decision.¹⁰⁰ Yet, the findings of the Law Judge are not necessarily binding on the agency or the court,¹⁰¹ because it is the agency's function to make the ultimate findings of fact and to select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs.¹⁰² Nevertheless, the reviewing court must consider the Law Judge's findings and give them such weight as they merit within

⁹¹ 5 U.S.C. § 706 (1970).

⁹² G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 33 (1974).

⁹³ *National Broadcasting Co. v. United States*, 319 U.S. 190 (1942); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1938).

⁹⁴ *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946).

⁹⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

⁹⁶ *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105 (1942); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965).

⁹⁷ 345 F.2d at 427.

⁹⁸ 340 U.S. at 493.

⁹⁹ *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 588-89 (D.C. Cir. 1970).

¹⁰⁰ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *American Fed. of Television & Radio Artists v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968); *Retail Store Employees Union, Local 400 v. NLRB*, 360 F.2d 494 (D.C. Cir. 1965).

¹⁰¹ 340 U.S. at 488.

¹⁰² *Greater Boston Television Corp. v. FCC*, 444 F.2d, 841, 853 (D. C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971); *Oil, Chemical & Atomic Workers, etc. v. NLRB*, 362 F.2d 943, 945-46 (D.C. Cir. 1966); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 828 (D.C. Cir. 1965), *cert. denied sub nom. W.W.I.Z., Inc. V. FCC*, 383 U.S. 969 (1966).

reason and the light of judicial experience.¹⁰³

The general rules stated above reflect the view of recent decisions that findings of fact in an agency decision will be upheld by the reviewing court if the findings are supported by substantial evidence, irrespective of whether those findings are consistent with those of the Law Judge as long as the agency at least implicitly rationalizes its differing result.

Credibility Findings

The thesis of this article is that greater weight than is the current practice ought to be accorded to the findings of fact made by administrative law judges. Because courts have traditionally given special weight to ALJ findings predicated upon a determination of a witness's credibility, a brief examination of the case law in this area will be helpful.

In *Universal Camera Corporation v. NLRB*¹⁰⁴ the Supreme Court stated that the significance of the examiner's decision "depends largely upon the importance of credibility in the particular case."¹⁰⁵ Later, the Supreme Court held that the agency need not go so far as to find that the findings were clearly erroneous in order to overturn them.¹⁰⁶ The underlying reason for according special weight to credibility findings is that the ALJ has had the opportunity to hear the testimony and to observe the witnesses while the agency and the court view only the cold record.

The recent cases from the appellate courts demonstrate that special weight is to be accorded ALJ findings predicated on credibility determinations.¹⁰⁷ Where an agency does use its power to reach opposite conclusions, the likelihood of its decision being upheld on appeal is directly related to the extent that its conclusions are supported by substantial evidence *aside from* the evidence from which it draws inferences at odds with its presiding officer. Thus, in situations where the ultimate resolution of an issue hinges exclusively on credibility determinations, an agency's conclusion contrary to that of the presiding officer is in a precarious position on review.

Thus, the courts have consistently recognized the competency of the ALJ to make crucial findings of fact. It is reasonable to conclude that if the ALJ is competent in this area of fact-finding, where he must often rely on his subjective impressions of testimony, he ought to be competent to make the remaining findings which have a more "objective" character. Clearly erroneous findings could be set aside on appeal. Allowing all his

¹⁰³ *Adolph Coors Company v. FTC*, 497 F.2d 1178, 1184 (10th Cir. 1974); *OKC Corp. v. FTC*, 455 F.2d 1159, 1162 (10th Cir. 1972).

¹⁰⁴ 340 U.S. 474 (1951).

¹⁰⁵ *Id.* at 496.

¹⁰⁶ *FCC v. Allentown Broadcasting Corp.* 349 U.S. 358, 364 (1955).

¹⁰⁷ *See, e.g., Retail, Wholesale, Dep't Store Union v. NLRB*, 466 F.2d 380, 386 (D. C. Cir. 1972) *citing* *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1105 (9th Cir. 1971); *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972); *OKC Corp. v. FTC*, 455 F.2d 1159, 1162 (10th Cir. 1972); *Acme Prod., Inc. v. NLRB*, 389 F.2d 104, 106 (8th Cir. 1968); *Bon-R Reprod. v. NLRB*, 309 F.2d 898, 904 (2d Cir. 1962); *Morrison—Knudsen Co. v. NLRB*, 276 F.2d 63, 70 (9th Cir. 1960).

findings to stand unless clearly erroneous, would make the ALJ a true trier of fact and not merely a record compiler.

The clearly erroneous standard is applied to all findings when made by federal trial judges in non-jury trials.¹⁰⁸ There is no reason to assume that federal trial judges are inherently or even demonstrably more competent than administrative law judges.¹⁰⁹ Assuming no statutory prohibition, a finding of fact by the ALJ should be allowed to stand unless a party can show it is clearly erroneous. The following sections develop this idea more fully.

E. The Administrative Law Judge

Description of Position

Success or failure of the entire administrative law system depends on the quality of the work done at this crucial place [hearing stage] in the movement of cases to a final determination.¹¹⁰

The above quotation vividly expresses the importance of the administrative law judge. This section is devoted to a discussion of the development of the position of administrative law judge and an examination of his role and function demonstrate that he is a competent trier of fact and decision maker. The initial decision of the ALJ should, therefore, be accorded greater weight than is now customary; findings of fact by the ALJ should not be given de novo review on appeal but should be granted finality in most cases.

The title "administrative law judge" is itself a recognition of the proper status of presiding hearing officers. In 1972, the Civil Service Commission changed the titles of "examiners," "trial examiners" and "hearing examiners" to administrative law judges.¹¹¹ This decision was the outgrowth of a longstanding and determined effort by the Federal Trial Examiners Conference¹¹² to bestow more prestige upon presiding hearing officers.¹¹³

¹⁰⁸ FED. R. CIV. P. 52(a).

¹⁰⁹ See section E *infra*.

¹¹⁰ Boyd, *A Hearing Examiner Comments on the APA and the Rule Making or Adjudication Controversy*, 11 WM. & MARY L. REV. 424, 449 (1969). For an excellent background treatment of the role of the administrative law judge, see M. RUHLEN, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* (1974).

¹¹¹ 5 C.F.R. § 930.203a (1977); see K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES*, § 10.00 (1976). Other titles which have been considered but were abandoned, were administrative trial judge and administrative chancellor. K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 10.01 (1970 Supp.).

¹¹² This organization is now named the Federal Administrative Law Judges Conference.

¹¹³ The argument for including "judge" within the title was that "hearing examiner" misled many people, that it implied inferiority, that it did not reflect the independence of the officers, that it interfered with efforts to get cooperation of federal and state officials in obtaining use of local courtrooms when hearings are held outside of Washington, D.C., that it was not descriptive of the high status of the office, and that a more dignified title would assist in attracting a higher quality of new officers. The primary argument against inclusion of "judge" in the hearing officer's title was that the term was misleading in that judges

Historical Development

Administrative agencies have such a volume of business, including cases in which a hearing is required, that the agency heads, the members of boards or commissions, can rarely preside over hearings in which evidence is required. The agencies met this problem long before the Administrative Procedure Act by designating hearing or trial examiners to preside over hearings for the reception of evidence. Such an examiner generally made a report to the agency setting forth proposed findings of fact in a "recommended" decision. The parties could file exceptions to the recommended decision. After receiving briefs and hearing oral argument the agency would make the final decision.¹¹⁴ Agency review of the examiner's decision was anticipated in all cases where a recommended decision had been issued even where no party had appealed.¹¹⁵

For a variety of reasons Congress intended the APA to give increased stature to hearing examiners.¹¹⁶ One way in which the APA achieves this goal is through adding more importance to the decisions of the examiners. Thus, the APA, unlike its predecessor statutes, permits the ALJ to render either a recommended or an initial decision.¹¹⁷ Unlike a recommended decision, an initial decision becomes the final decision of the agency absent appeal by a party or review by the agency on its own motion.¹¹⁸

Each agency is to appoint as many administrative law judges as required to conduct its proceedings.¹¹⁹ To minimize agency control, ALJ's are assigned to cases in rotation as far as practicable and may not perform duties or responsibilities inconsistent with their obligation to remain independent hearing officers.¹²⁰ An agency may dismiss an administrative law judge only for good cause which is to be established and determined by the Civil Service Commission on the record after opportunity for hearing.¹²¹ Promotions are determined and pay is prescribed not by the employing agency but by the Civil Service Commission independent of agency recommendations or ratings.¹²² An administrative law judge is charged to render an impartial decision consistent with the published rules of the agency and

characteristically make final decisions subject to appeal, whereas the initial decisions of presiding officers were customarily given a de novo review by the agency, thus resulting in something somewhat less than "final" decision making. However, when one examines this argument closely, it appears that the only real distinction between the review given by an appellate court to a trial judge's decisions and the review given by agency heads to initial decisions lies in the area of findings of fact.

¹¹⁴ *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 130-32 (1953).

¹¹⁵ 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 10.03 (1958). See § 11 of the APA, *codified in*, 5 U.S.C. §§ 1305, 3105, 3344, 5362, 7521 (1970).

¹¹⁶ See section F *infra*.

¹¹⁷ 5 U.S.C. § 557(b) (1970).

¹¹⁸ *Id.*

¹¹⁹ 5 U.S.C. § 3105 (1970).

¹²⁰ *Id.*

¹²¹ 5 U.S.C. § 7521 (1970).

¹²² 5 U.S.C. § 5362 (1970).

its organic statute.¹²³ Detailed regulations of the Civil Service Commission implement the aforementioned statutory provisions directed at securing independence of agency administrative law judges.¹²⁴

Although judicial treatment of the appointment and removal of the administrative law judge has not been extensive, the existing cases have made clear the relationships among the administrative law judge, the Civil Service Commission, and the employing agency. The Supreme Court has held that the Civil Service Commission may classify ALJ's employed by the same agency according to experience, skill and ability and vary their salaries accordingly.¹²⁵ Moreover, rules may be promulgated for assignment of cases in rotation based on the experience, skill and ability of the agency's Law Judges.¹²⁶ Thus, the newer, less experienced judges may be precluded from assignment to the more difficult cases and may be paid less if the agency so desires.

Although only the Civil Service Commission can institute formal proceedings against an ALJ, the executive head of the agency may properly initiate the proceedings by requesting the Civil Service Commission to investigate an ALJ to determine whether good cause exists for his removal.¹²⁷ "Removal for good cause" has been interpreted to include temporary suspension and other lesser administrative sanctions.¹²⁸

Although an ALJ is to render his decision free from agency influence, that does not mean he is exempted from *administrative* supervision or control by the agency.¹²⁹ Thus, he may be required to report to the Personnel Director and to complete status reports on his work load; failure to do so may result in suspension without pay.¹³⁰

On review of a decision of the Civil Service Commission removing an ALJ for good cause, the court is not free to substitute its judgment for that of the Commission. The decision of the Commission removing an ALJ must be upheld if the decision is supported by substantial evidence, not arbitrary or capricious, and if there was substantial compliance with relevant procedural requirements.¹³¹

Powers of the Administrative Law Judge

In general it may be said that the administrative law judge possesses powers very similar to those of a federal district judge in a non-jury civil

¹²³ 5 U.S.C. § 556(b) (1970).

¹²⁴ 5 C.F.R. §§ 930.210 - 930.234 (1976).

¹²⁵ *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 136 (1953).

¹²⁶ *Id.* at 140.

¹²⁷ *In re Karl Stecher*, 11 Ad.L.2d 868, 871 (Civ. Serv. Comm'n 1961).

¹²⁸ *Id.* at 875-76.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Hasson v. Hampton*, 34 Ad.L.2d 819, 821-22 (D.D.C. 1973). The ALJ in *Hasson* had accepted meals and drinks in violation of the agency's canon of ethics and had spent the night with a woman other than his wife.

trial. Thus, the ALJ may administer oaths and affirmations; issue subpoenas; rule on offers of proof and receive relevant evidence; take depositions or have depositions taken when the ends of justice would be served; regulate the course of the hearing; hold prehearing conferences and other conferences for the settlement or simplification of the issues; dispose of procedural requests or similar matters; render initial decisions and take any other agency authorized action not inconsistent with the APA.¹³² The trend among agencies is expansion of ALJ authority through rulemaking involving a re-interpretation of the ALJ's inherent authority or an additional delegation of agency authority.¹³³

The author's proposal is to continue this trend by giving greater finality to ALJ findings of fact. This proposal can be implemented without statutory amendment¹³⁴ and involves nothing more than a self-imposed standard calling for appellate rather than de novo review of findings of fact by the ALJ. This proposal demands an examination of two questions. First, why should agencies place more reliance on the decisions of their subordinate hearing officers? Second, assuming an agency does desire to give greater weight to the initial decisions of its ALJ's, can it do so under the Administrative Procedure Act or must it seek enabling legislation?

With the sole exception of credibility findings, agencies are generally unfettered in making findings of fact during the course of their de novo appraisal of prior proceedings.¹³⁵ Agency review of the evidence and issues results in considerable delay, cost to the taxpayer and the litigants, and loss of efficiency and integrity in administrative process.¹³⁶ Cries for shortening delays in administrative decisionmaking usually call for statutory authorization for discretionary review or appellate review boards as the solution. The author sees the solution as one to be imposed from within the agency without statutory amendments.

Arguments for Adoption of ALJ Findings

This section has thus far recited what may be considered the "obvious" reasons for according more weight to the findings of fact made in initial proceedings. Thus, it has been demonstrated that the Administrative Procedure Act sought to enhance the status of the "hearing examiner." This was done by granting independence from agency influence and the power to render a decision which becomes the final agency decision in the absence of appeal by a party or review by the agency on its own motion. Additionally, the APA granted "hearing examiners" authority over hearings

¹³² 5 U.S.C. § 556(c) (1970). An administrative law judge does not have authority absent a court order to cite someone for contempt.

¹³³ See recent changes at the FCC, for example: *Adjudicatory Reregulation*, 58 F.C.C. 2d 865 (1976).

¹³⁴ See section F *infra*.

¹³⁵ See section D *supra*.

¹³⁶ Fauver, *An Agenda for Investigation: Should the APA Be Amended to Provide Standards for Agency Review of Administrative Trials?*, 1973 *DUKE L. J.* 135, 136 (1973).

roughly equivalent to that of a federal district court judge. The remainder of this section will advance other reasons why ALJ's should be given the authority to *really* make findings of fact.

Policy Formulation

A former FCC Commissioner has said that the predominant purpose of the regulatory agencies is to implement policy thought to be in the public interest, rather than merely to secure justice between parties with conflicting private interests.¹³⁷ Agencies are intended to be policy formulators and not judicial arbiters. Thus, the time of agency members is better devoted to matters of policy planning and not review of initial decisions.

Moreover, if agency members concentrated more on the enunciation of policy and guidelines for implementation of that policy, there is every reason to believe that initial decisions would be more in line with the agency policy.¹³⁸ The additional time required for the enunciation of policy guidelines would be derived from spending less time reviewing initial decisions. Thus, findings of fact in initial decisions should be set aside only if clearly erroneous, thereby providing additional time for agency members and their staffs to concentrate on policy matters, where their efforts can have the greatest possible utility.

Undue Repetition of Efforts

Since agencies now typically embark on a de novo appraisal of an initial decision when that decision is reviewed, questions arise as to the function of the Law Judge and purpose of the hearing at which he presides. As the situation now exists, the ALJ's decision is treated as no decision at all; on appeal the agency starts from ground zero in reaching its decision. The initial decision does not serve in any real sense to whittle down the matters to be considered by the agency on review. In short, despite the legislative history of the APA which clearly reveals an intention to make the presiding judge more than a mere monitor present at the reception of evidence,¹³⁹ the agencies continue to treat initial decisions in the manner in which they treated recommended decisions prior to the enactment of the APA. Permitting the ALJ to make findings of fact which would not be set aside unless clearly erroneous would make the initial decision a real decision. Under such a system, the ALJ would be reducing the matters to be given in depth attention on appeal. Most importantly, this approach would end the present anomaly of providing every litigant before an agency with two bites at the apple of adjudication.

¹³⁷ Loevinger, *The Administrative Agency as a Paradigm of Government—A Survey of the Administrative Process*, 40 *IND. L. J.* 287, 307 (1965).

¹³⁸ *ASH REPORT*, *supra* note 70, at 51.

¹³⁹ See notes 184 and 185, *infra*. See also section F *infra*.

The Law Judge as a Competent Trier of Fact

As has been discussed,¹⁴⁰ agencies and reviewing courts have shown an affinity for adopting the credibility findings of Law Judges. The rationale for this approach is that the ALJ who saw and heard the witnesses is in a better position to judge their credibility than the agency members who are confronted with a cold record.¹⁴¹ There is no reason to distinguish between the Law Judge's competence to make findings of fact predicated upon credibility determination and his competence to make findings of fact where no credibility determination is required. By openly admitting that a Law Judge's credibility findings are entitled to great weight, the agencies and the reviewing courts have recognized that he is a competent finder of fact.

Presumably the underlying reason agencies rely so little on the Law Judge's findings on other factual matters is their assumption that they are equally capable of finding facts upon the record before them as was the Law Judge when he had the record before him. This assumption is, however, questionable. It would appear more reasonable to believe that an experienced Law Judge who saw the witnesses and heard the testimony, and who can devote a considerable amount of his time to personal examination of the record and preparation of the initial decision, would be a more desirable trier of fact than the agency members whose other responsibilities force them to rely heavily, if not exclusively, on staff recommendations and permit only cursory attention to any one adjudication. Moreover, the Law Judge is often more qualified by education and work experience to be a trier of fact than are agency members. ALJ's are attorneys with experience practicing before administrative agencies while agency members come from all walks of life and often have no legal training. This argument is not intended as a swipe at the competence of agency members, but as an exhortation to direct their energies and their varied pre-agency backgrounds in the direction where they can serve the most good—policy formulation and planning. The author is not taking the position that agency members are incompetent to make findings of fact, but rather that there is no reason for them to spend their precious time doing so when the efforts of an expert trier of fact—the ALJ—are already available in the initial decision. Succinctly stated, the Law Judge is intended for adjudication and the agency members are entrusted with policy formulation. As long as agencies continue to usurp the role of the Law Judges, decisional delay at the agency level will be the rule rather than the exception.

Conclusion

Four reasons support the conclusion that the findings of fact by an administrative law judge should not be disturbed by the agency on review

¹⁴⁰ See text accompanying notes 90-124 *supra*.

¹⁴¹ See text accompanying notes 104-108 *supra*.

unless clearly erroneous. First, except for agency administrative control, the ALJ is free to render an impartial decision free from agency influence and political considerations. This is an important consideration if there is any validity to the frequent charge that some agency members at times tend to put political considerations ahead of rationality in their decisions. Second, agency members are intended to be policy formulators and not judicial arbiters. Agency members bring with them varied experiences in diverse fields which make agencies a fertile environment for policy formulation. But agency members with their diverse educational backgrounds desirable for policy formulation are not necessarily as suited to adjudicative decision making as the Law Judge who is qualified by virtue of his legal training and work experience. Further, the Law Judge, unlike agency members, is able to devote substantial time to personal examination of the record and preparation of the initial decision. Third, elimination of de novo review of findings of fact would afford agency members greater time for policy formulation. De novo review of findings of fact is inconsistent with the APA's intent to make the initial decision a real decision. De novo review of facts duplicates efforts and gives litigants an unnecessary second opportunity to prevail in an adjudication. Finally, agencies and courts recognize that an ALJ is competent to make reliable findings of fact where he must first make a credibility determination. It is reasonable then to conclude that he is competent to make findings of fact of a more "objective" character and not involving the somewhat "subjective" credibility determinations.

F. Authority of Administrative Agencies To Adopt Appellate Review of Facts

The preceding two sections have concentrated on the desirability of instituting a system of appellate review of the findings of fact in initial decisions. This section demonstrates that section 8(a) of the APA authorizes agencies to adopt a system of mandatory appellate review, thereby obviating the need for statutory authorization. The final section will present a hypothetical application of the author's proposal.

Legislative History of the APA

For more than ten years prior to adoption of the APA in 1946, Congress considered various proposals for general statutes respecting administrative law and procedure.¹⁴² The bill which ultimately became the APA was precipitated by the Attorney General's recommendation in 1938 that a commission be appointed to make a thorough survey of existing practices and procedure and then to make suggestions for improvement.¹⁴³ The President

¹⁴² SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, REPORT ON S.7, S. REP. NO. 752, 79th Cong., 1st Sess. 1 (1945).

¹⁴³ *Id.* at 4.

concurred and the final product of the committee became what is generally referred to as the Attorney General's Report.¹⁴⁴

The remainder of this section will discuss whether the following provision of section 8(a) authorizes agencies to implement appellate review of initial decisions:

On appeal from or review of the initial decisions of such officers [hearing examiners] the agency shall, *except as it may limit the issues upon notice or by rule*, have all the powers which it would have in making the initial decision (emphasis added).¹⁴⁵

The Attorney General's Report

The Attorney General's Report had a great deal to say about what it thought should be the role of the Law Judge (then called hearing commissioner) in the decision-making process and the effect of his decision on appeal to the agency. Among its recommendations the Committee stated:

A major purpose of the Committee's recommendations is to increase, in most agencies, the effect of the hearing officer's work in the decision of the case. The Committee contemplates that his decision will serve as the initial adjudication of most cases, and the final adjudication in many, just as does the decision of a trial court. Accordingly, an integral part of the Committee's recommendations is that, in the absence of appeal, the decision of the hearing commissioner be final and effective without further action or consideration by the agency. But to preserve uniformity of decision and effective supervision of an agency's work, the Committee recommends not only that the parties, including the agency's trial attorney, be permitted to appeal, but also that the agency heads may, within the period for appeal, take up any decision for review upon their own motion.

In general, *the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court*. Conclusions, interpretations, law and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, *the agency should be reluctant to disturb his findings unless error is clearly shown*. And in the event that the agency does

¹⁴⁴ ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES—REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE APPOINTED BY THE ATTORNEY GENERAL, AT THE REQUEST OF THE PRESIDENT, TO INVESTIGATE THE NEED FOR PROCEDURAL REFORM IN VARIOUS ADMINISTRATIVE TRIBUNALS AND TO SUGGEST IMPROVEMENTS THEREIN, S. DOC. NO. 8, 77th Cong., 1st Sess. (1941) [hereinafter cited as REPORT OF THE ATTORNEY GENERAL].

¹⁴⁵ 5 U.S.C. § 557(b) (1970).

¹⁴⁶ REPORT OF THE ATTORNEY GENERAL, *supra* note 144, at 51.

find facts contrary to those found by the hearing commissioner, the agency's opinion should articulate with care and particularity the reasons for its departures, not only to disclose the rationale to the courts in case of subsequent review but to assure that the agency will not carelessly disregard the decision of the hearing commissioner (emphasis added).¹⁴⁶

The Committee also recommended that an appeal assume the following nature:

The specific grounds of appeal should be required to be stated, so that the review of a hearing commissioner's decision may be limited accordingly. Because of differences in the subject matters involved in cases before the several agencies, *the scope of review should be left for later definition by the agencies*; but it should be made plain by statute that *where an appeal is based upon allegedly erroneous determinations of fact by the hearing commissioner, the agency may permissibly, but is not required to, confine its examination of the record to the portions cited and may reject that ground of appeal unless those portions disclose that the finding is clearly wrong*. In other words, mere allegations of error without convincing support should not impose on the agency heads the duty of reading an entire record (emphasis added).¹⁴⁷

Clearly the Attorney General's Committee contemplated that the hearing officer's decision would have significant weight on appeal especially in the area of findings of fact where the Committee had recommended the clearly erroneous standard for reversal on appeal. As if intent on insuring no misunderstanding of how much deference should be paid to hearing officer findings of facts, it went on to state that the ultimate statute adopted should permit, but not require, agencies to adopt the clearly erroneous standard for reversal of findings of fact.

Bills in Congress

In January, 1945, Senator McCarran introduced S.7,¹⁴⁸ the bill which, after revision, became the Administrative Procedure Act. Contemporaneously, the identical bill was introduced into the House, H.R. 1203,¹⁴⁹ along with five other bills¹⁵⁰ seeking to establish a general administrative procedure act. The most significant bills, S.7 and H.R. 1203 contained no provision for the scope of agency review of initial decisions.¹⁵¹

¹⁴⁷ *Id.*

¹⁴⁸ S.7, 79th Cong., 1st Sess. (1945).

¹⁴⁹ H.R. 1203, 79th Cong., 1st Sess (1945).

¹⁵⁰ H.R. 184, H.R. 339, H.R. 1117, H.R. 1206, H.R. 2602, 79th Cong., 1st Sess., (1945) (For text see S. Doc. No. 248, 79th Cong., 2d Sess. 131-83 (1946)).

¹⁵¹ H.R. 1203 provided in pertinent part:

DECISIONS

SEC 8. In cases in which a hearing is required to be conducted in conformity

Of more than historical interest are the provisions of the other five House bills. Thus, H.R. 184 provided:

SEC. 309, Review of Hearing Commissioner's Decision by Agency Tribunal . . .

(1) . . . Where the appellant asserts that the hearing commissioner's findings of fact are against the weight of the evidence, the agency *may* limit its consideration of this ground of appeal to the inquiry whether the portions of the record cited disclose that the findings are *clearly against the weight* of the evidence. (emphasis added).

H.R. 339 and H.R. 1117 provided:

SEC. 7 . . .

(c) Agency Review. . . . [R]eview by the agency shall be confined to matters of law and administrative discretion.

H.R. 1206 provided, similarly to H.R. 184, that:

SEC. 308.

(o) Agency Review of Decisions of Presiding Officers. . . . Where the appellant asserts that the findings of fact made by the presiding officer are unsupported by evidence, the agency *may* limit its review of such ground to the inquiry whether, upon the portions of the record cited by the parties, the findings made by the presiding officer are *clearly contrary to the manifest weight* of the evidence [emphasis added].

H.R. 2602 omitted any reference to review of initial decisions.

with section 7—

(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision. Subordinate officers recommending decisions or making initial decisions shall first receive and consider written and oral arguments submitted by the parties.

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended decision, initial decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions, (2) exceptions to decisions or recommended decisions of subordinate officers, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended decisions shall be a part of the record, stated in writing, served upon the parties, and include a statement of (1) findings of fact, conclusions of law, and reasons therefor upon all relevant issues of fact, law, or agency discretion presented and (2) the appropriate rule, order, sanction, relief, or denial thereof supported by such findings, conclusions, and reasons.

Senate Action on S.7

In June, 1945, House hearings were held on H.R. 1203, identical to S.7, and the related bills¹⁵² already discussed.¹⁵³ Following these hearings, which are of no importance to this article, this sentence was added to section 8(a) of the original S.7 and reported:

On appeal from or review of the initial decisions of such officers [hearing examiners] the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have had in making the initial decision.¹⁵⁴

Although no explanation was given in the Report¹⁵⁵ which accompanied revised S.7 as to *why* the sentence was added, the following is supplied as an explanation of the *meaning* of this addition:

The provision that on agency review of initial examiners' decisions the agencies shall have all the powers it would have had in making the initial decision *does not mean* that the initial examiners' decisions (or their recommended decisions) are without effect. They become a part of the record in the case. They would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing (emphasis added).¹⁵⁶

Of particular interest are the comments of Attorney General Tom C. Clark on the revised version of S.7.¹⁵⁷ After recommending enactment of the bill the Attorney General stated:

I think it may be advisable for me to attach to this report an appendix discussing the principle provisions of the bill. *This may serve to clarify some of the essential issues* and may assist the committee in evaluating the impact of the bill on public and private interests (emphasis added).¹⁵⁸

In that appendix the Attorney General explained the meaning of section 8(a) as follows:

Upon review the agency *may restrict its decision to questions of law, or to the question or whether the findings are supported by substantial evidence or the weight of evidence*, as the nature of the case may be. On the other hand, it may make entirely new findings

¹⁵² *Id.*

¹⁵³ *Federal Administrative Procedure: Hearings Before the Committee on the Judiciary on H.R. 1203 et al.*, 79th Cong., 1st Sess. (1945).

¹⁵⁴ S. REP. NO. 752, 79th Cong., 1st Sess. 35 (1945).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 24.

¹⁵⁷ *Id.* at 37-38.

¹⁵⁸ *Id.* at 38.

either upon the record or upon new evidence which it takes. (emphasis added).¹⁵⁹

The explanation of the bill's provision offered by the Senate makes clear that examiners' decisions are not to be meaningless, but are to have real effect on appeal to the agency. Since the reference to the consequence of the examiner's credibility findings is prefaced by "for example," it clearly demonstrates that the Committee did not intend the consequence of his decision to be limited to this area as courts have traditionally limited it.¹⁶⁰

Since the Attorney General participated intimately in the drafting and revising of the bill,¹⁶¹ his interpretation of its meaning is to be accorded great weight. He expressly stated that section 8(a) permitted an agency either to limit the scope of review of examiners' initial decisions, *inter alia*, to questions of law or to make entirely new findings of fact. The Attorney General also explained that between these two extremes an agency was authorized to follow other standards such as "against the weight of the evidence" or "unsupported by substantial evidence." Therefore, the Attorney General interpreted the bill as providing the greatest possible amount of discretion to agencies to fashion a standard for the scope of review of findings of fact. When the Attorney General's statement is considered with the Senate Committee's emphasis on affording weight to the initial decision, it is evident that appellate review of findings of fact would be consistent with the bill.

House Action on S.7

Following Senate approval of S.7¹⁶² it was approved by the House Committee on the Judiciary and sent to the full House with an attached Report.¹⁶³ Respecting section 8(a) of the bill, the Report recited the identical passage in the Senate Report on this section of the bill concerning the significance of the examiners' decisions¹⁶⁴ and then made this comment regarding the scope of agency review of initial decisions:

In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10(e) of the bill.¹⁶⁵

Section 10(e)¹⁶⁶ of the bill (and the APA) provides that a court is to set aside findings of fact by the agency which are "unsupported by substantial

¹⁵⁹ *Id.* at 43.

¹⁶⁰ See text accompanying note 95, *supra*.

¹⁶¹ S. REP. No. 752, 79th Cong., 1st Sess. 5 (1945).

¹⁶² 92 CONG. REC. 2167 (1946). Senate debate on the bill may be found at 92 CONG. REC. 2041-46, 2148-67 (1946).

¹⁶³ ADMINISTRATIVE PROCEDURE ACT, HOUSE COMM. ON THE JUDICIARY REPORT ON S.7, H.R. REP. No. 1980, 79th Cong. 2d Sess. (1946).

¹⁶⁴ *Id.* at 38; see text accompanying note 156 *supra*.

¹⁶⁵ H.R. REP. No. 1980, 79th Cong., 2d Sess. 38-39 (1946).

¹⁶⁶ 5 U.S.C. § 706(e) (1970).

evidence."¹⁶⁷ Since the House would permit agencies on review to require that the findings of fact by its examiners be supported by substantial evidence only, it is clear that the House envisioned agencies using appellate review since, by its very nature, the standard of substantial evidence would conceptually preclude *de novo* review. Further, as the Senate had done in its report on the bill, the House reiterated that an agency could adopt in whole or in part the findings of fact of the examiner,¹⁶⁸ thereby implicitly authorizing *de novo* review. The version of the bill under explanation by the House did not include the phrase "except as it may limit the issues" but simply read:

On such appeal or review, the agency has all the powers it would have had in making the initial decision.¹⁶⁹

Since the House was willing to permit agency review based on substantial evidence under the above language, *a fortiori* it would have permitted review based on a substantial evidence standard under the provision ultimately adopted which includes the above language and adds thereto the phrase "except as it may limit the issues upon notice or by rule,"¹⁷⁰ which expressly authorizes agencies to limit the issues on appeal.

The conclusion to be drawn from the history in the House is the same as that to be drawn from the history in the Senate: section 8(a) of the Administrative Procedure Act authorizes appellate review by agencies of initial decisions.

Attorney General's Manual on the APA

To inform agencies of their responsibilities under the then newly adopted APA,¹⁷¹ the Attorney General, who had been intimately involved in the drafting and revising of S.7, published a guide to the APA in 1948.¹⁷² The *Manual* interprets section 8(a) in pertinent part as follows:

Section 8(a) empowers agencies to 'limit the issues upon notice or by rule' on appeal from or review of the initial decisions of hearing officers. That is, an agency may limit the issues which it will consider in such cases by notice in a particular case or by a general rule published in the Federal Register. *It may restrict its review to questions of law and policy or, where it is alleged that erroneous findings of fact have been made by the hearing officer, to determine whether cited portions of the record disclose that the findings are clearly wrong* [citations omitted]. (emphasis added).¹⁷³

¹⁶⁷ *Id.*

¹⁶⁸ H.R. REP. No. 1980, 79th Cong., 2d Sess. 39 (1946).

¹⁶⁹ *Id.* at 38.

¹⁷⁰ *Id.* at 5.

¹⁷¹ The APA was enacted in 1946.

¹⁷² ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1948).

¹⁷³ *Id.* at 84.

Thus, the legislative history of section 8(a) and the Attorney General's Manual clearly support the proposition that agencies may implement appellate review of the decisions of their Law Judges. Under such a system reversals would be based on errors of law or policy or both, as is presently the case. However, findings of fact by the Law Judge would not be disturbed unless clearly erroneous. Agencies would therefore adopt the same type of review as found in the courts.¹⁷⁴

G. Conclusion

Model of Proposal

It is now possible to articulate with specificity how the author's proposal would be implemented if adopted. Instead of approaching the task on an agency by agency basis, the author will examine a hypothetical proceeding before the FCC involving certain types of findings of fact which occur in similar form before other agencies. He will then examine the treatment of those findings from the appellant's position and from the agency's position.

The author's proposal would be useful only where there are disputed findings of fact, because, in the absence of disputed facts, the agency will simply adopt those adopted by the ALJ.

At the FCC a typical hearing involving A, a renewal applicant, and B and C, two competing applicants for a mutually exclusive broadcast license, conceivably could include, among others, the following issues:

- a. Whether each applicant possesses the requisite character to be a Commission licensee;
- b. Whether each of the applicants is financially qualified to be a licensee;
- c. Whether each of the proposed stations is technologically adequate;
- d. Whether any applicant is qualified to be a licensee, and if more than one is qualified, a comparative ranking of the qualifiers in order of preference since only one can be granted the license.

For purposes of illustration it will be assumed that following the comparative hearing among the three applicants, the administrative law judge ultimately concluded that renewal applicant A did not have the requisite character to remain a licensee and was therefore disqualified; that although both B and C were financially qualified, B's financial qualifications were superior to C's; that B and C proposed technologically adequate station facilities, but that C's proposal was superior to B's; that B's prior broadcast experience was far greater than C's; that on the whole record B should be awarded the license over C; that had A not been disqualified on the character issue, he would have been awarded the license because his

¹⁷⁴ FED. R. CIV. P. 52(a).

financial qualifications, prior broadcasting experience and prior station operation were superior to both B's and C's proposals.

These hypothetical conclusions were based on these findings of fact by the ALJ:

A has had a long standing relationship with an organization which actively advances racist policies. Recently A addressed this group and stated from the podium, "Once I get my station, I'll do my best to keep the minorities in their place."

A's testimony that he did not make such a statement and that he was not present at this meeting is not credible when considered in light of Y's unbiased testimony that, as an investigative reporter, he attended this meeting, saw A present and heard A make the statement above.

Under the present system, on appeal before the Commission, A would typically except to the Judge's finding of fact that A had made the damaging statement. A would argue that the Judge's finding was erroneous. The Commission would then undertake a *de novo* review aware that these findings involve credibility determinations.

Under the author's proposal, however, an agency would give only a summary review to exceptions to findings of fact unless the exceptor could make a preliminary showing of clear error. Thus, under the author's proposal, the Judge's finding would not be set aside unless A could make a preliminary showing in his exception that the finding was clearly erroneous and not merely in error. Absent this showing the Commission would simply accept the finding of the Law Judge. Thus, the credibility determination of the ALJ who saw and heard the witnesses would be accorded greater weight than is current practice.

Exceptions to other findings of fact in the initial decision would be handled in much the same way. Thus, assuming the Judge relied on his finding that B's and C's net worths were, respectively, \$175,000 and \$115,000 to support his conclusion that both were financially qualified, C, the unsuccessful applicant, in his exception to such findings would have to show that the Judge's finding was clearly erroneous before the Commission would be obligated to read the whole record. For example, he might demonstrate in his exceptions that the Judge erroneously computed B's assets by treating a liability as an asset so that absent the arithmetical error, B's net worth is insufficient to make him financially qualified.

A similar approach would apply to the record evidence on prior experience in broadcasting. Credibility of witnesses could be involved if the evidence is largely testimonial.

The record evidence on the technological aspects of the proposed station would consist mainly of expert testimony offered by each applicant. Credibility of the expert witnesses would not be a central issue. Instead the challenge would be directed toward the substance of an expert's testimony which would include his method of analysis. Thus, an applicant excepting to an ALJ's findings concerning the testimony of an expert would have to

demonstrate preliminarily, for example, that the ALJ clearly misinterpreted or misapplied the expert's testimony and thus made findings which were clearly erroneous.

Under the author's proposal, review of conclusions would be open to full review as they are now. Thus, in the illustration the Judge's conclusion that B should receive the license and not A or C would be open to full review. Only findings of fact supporting (or not supporting) those conclusions would be subject to summary review.

Adoption of the author's proposal—mandatory appellate summary review of facts—would be most beneficial to those agencies where disputed facts, and not merely the conclusions drawn therefrom, are frequent.

The contention that mandatory appellate review is less efficient than discretionary review is greatly weakened by the fact that discretionary review requires statutory authorization while mandatory appellate review can be implemented immediately; and that, as the CAB statistics reveal, discretionary review in the long run is granted so often in practice (83% of cases in which requested) as to amount to automatic review.

Moreover, discretionary review when granted is *de novo* review with all of its attendant delays and disadvantages. Perhaps the best solution, which would require statutory amendment, would be review which is discretionary and appellate rather than discretionary and *de novo*.¹⁷⁵

Attempted Reform Since the APA

The Hoover Commission and its Task Force¹⁷⁶ in 1955, and the Ash Report¹⁷⁷ in 1971, both recommended administrative procedural reform focused on giving greater finality to the decisions of administrative law judges. The Hoover Commission stated that "hearing commissioners should have authority as presiding officers comparable to that of trial judges."¹⁷⁸ The Task Force had recommended that "the agency should have only the powers of review that a court has upon judicial review of agency decisions."¹⁷⁹ Adopting the thrust of these two recommendations, the American Bar Association in 1956 proposed that the Law Judge's findings of fact not be set aside by the agency unless they were "contrary to the weight of the evidence."¹⁸⁰ The Ash Report later recommended that

¹⁷⁵ An alternative, which the author did not discuss in this article because that alternative is not in use, is an intermediate appellate review board composed of former agency administrative law judges. This is only slightly more desirable than the present review board because ALJ's might have less resistance to review by senior ALJ's than to review by senior agency employees. Otherwise, this type of review board is undesirable for the reasons discussed in the chapter on review boards.

¹⁷⁶ HOOVER COMMISSION, LEGAL SERVICES AND PROCEDURE, A REPORT TO THE CONGRESS (1955); HOOVER COMMISSION, TASK FORCE ON LEGAL SERVICES AND PROCEDURE, REPORT ON LEGAL SERVICES AND PROCEDURE (1955).

¹⁷⁷ THE ASH REPORT, *supra* note 70.

¹⁷⁸ HOOVER COMMISSION LEGAL SERVICES AND PROCEDURE, A REPORT TO THE CONGRESS 63 (1955).

¹⁷⁹ HOOVER COMMISSION, TASK FORCE ON LEGAL SERVICES AND PROCEDURE 203 (1955).

¹⁸⁰ 81 ABA Rep. 375, 497 (1956).

agencies "concentrate on the enunciation of broad agency policy and guidelines."¹⁸¹ Agency review should be discretionary and "primarily for consistency with agency policy."¹⁸² Congressional attempts to implement the recommendations of the Hoover Commission, the ABA, and the Ash Council have been unsuccessful.¹⁸³

Concluding Remarks

For years agencies have been accused of unreasonable delay in their decision-making processes. To alleviate the problem two methods have been attempted, albeit on a limited scale: review boards and discretionary review. Now that we have had sufficient time to evaluate both, the conclusion is that neither has lived up to its promise. The time has come to seek another approach. The author suggests that agencies use summary appellate review, thereby permitting the Law Judge, who is in a better position for fact finding, to decide the facts. Agencies would then have more time on appeal to devote to the legal and policy issues.

De novo review of facts is tedious, time-consuming, and pointless duplication of the efforts of a highly qualified Law Judge. Administrative agencies were created to afford rapid resolution of disputes between the government and citizens. De novo review has made agency resolution of disputes inconsistent with the legislative objective. Furthermore, setting aside findings of fact only if clearly erroneous would increase the prestige of the Law Judge, encourage the parties to put confidence in him, thereby ultimately encouraging more highly qualified individuals to seek these positions.

Adoption of summary appellate review would greatly expedite agency review of findings of fact, reduce administrative delay, and finally make the administrative law judge a real decision maker and not simply a "monitor at the hearing . . ." ¹⁸⁴ without power "to play a real part in the final decision of the cases."¹⁸⁵

¹⁸¹ THE ASH REPORT, *supra* note 70 at 51.

¹⁸² *Id.* at 50.

¹⁸³ Kennedy, *Forward: ABA Proposals for Amendments to Administrative Procedure Act*, 24 ADMIN. L. REV. 371, 375-81 (1972).

¹⁸⁴ S. Doc. No. 8, 77th Cong., 1st Sess. 14 (1941).

¹⁸⁵ *Id.*

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