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Evidence and Findings in Administrative Agencies

James P. Castberg

As will be demonstrated, the trend in the administrative process is to move away from the strict rules of evidence by placing more reliance upon the discretion of the judge or the presiding officer, and allowing him to admit all evidence that seems relevant and useful. Experience has indicated that the exclusionary rules, formulated to serve the requirements of jury trials in order to protect untrained jurors from evidence that might be unreliable (even though relevant), are unsatisfactory both in the federal and the state administrative process. This note will examine the treatment given various exclusionary rules of evidence, official notice, and the requirement of findings, by federal and state administrative agencies, with particular reference to the Federal Administrative Procedure Act and the Model State Administrative Procedure Act as they bear on these three subjects.

EVIDENCE

The federal courts, led by the Supreme Court, have consistently followed a trend away from the application of the restrictive rules to evidence in administrative proceedings. In a comparatively recent decision, the Supreme Court observed that it had long been settled that the technical rules for the exclusion of evidence applicable in jury trials did not apply to proceedings before federal administrative agencies, in the absence of a statutory requirement that such rules are to be observed.[1] This view was followed in a later case, *Universal Camera Corp. v. N.L.R.B.*,[2] in which the Court, reviewing an administrative ruling, held that however halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything "logically probative of some matter requiring to be proved." Section 7 (c) of the Federal Administrative Procedure Act[3] provides a statutory expression of this trend that the courts have referred to in the previously cited cases. It provides for the reception of any oral or documentary evidence and excludes only that which may be irrelevant, immaterial or undudy repetitous. Section 7 (c) further provides that no sanction shall be imposed or rule or order issued except

1. Opp Cotten Mills v. Administrator, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624 (1941).
2. 340 U.S. 474 (1951).
3. 60 Stat. 237 (1946), 5 U.S.C. § 1006.
   Section 7 (c) Evidence—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and inaccordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case of defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by and in accordance with the reliable, probative, and substantial evidence.

One of the most important of the exclusionary rules which merits comment is the hearsay rule. A federal court in the state of New York ruled in a jury case that hearsay evidence is admissible if resorting to it will be essential to discovery of the truth, and if the surroundings persuade the court that the information adduced by the declarant is reliable.[4] A more recent case in the Federal District Court in Massachusetts, sitting without a jury in an antitrust proceeding, ruled that hearsay should be admitted if it is of the kind that would usually affect the actions of fair-minded men in the conduct of their more important affairs.[5] From a comparison between these holdings and Section 7 (c) it is probable that the Federal Courts will permit the admission of hearsay evidence which seems to be reliable and if it has some probative value. The Federal Courts have also ruled that such evidence, admitted without objection and uncontradicted, will support the findings of an administrative hearing.[6]

Section 7 (c) further provides that all parties before an administrative hearing shall have the right to submit rebuttal evidence and to conduct cross-examination, as may be required for a full and true disclosure of the facts.[7] The Supreme Court, in upholding a lower Federal Court's decision which issued an injunction against the enforcement of an order by the Postmaster General on the grounds that the respondent was deprived of reasonable opportunity to cross-examine witnesses on the vital issues of the case, said, ". . . in this kind of case as in others, one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue of his purpose to deceive."[8] Although this case was decided prior to the adoption of the Administrative Procedure Act, it is evident that the Federal Courts feel strongly the right of cross-examination, especially where the rights of any party will be prejudiced if cross-examination is not allowed. The only exception is where national security is involved and the courts have refused to allow cross-examination by the accused since cross-examination necessarily demands confrontation which would disclose the identity of the informer.[9]

One rule of exclusion that Section 7 (c) fails to cover is that of privilege. The hearing officers, the legislatures, and the courts have been reluctant to overturn this exclusionary rule. The Federal Court in *SEC v. Harrison*[10] assumed that the attorney-client privilege was the same for a

4. United States v. Alumnium Co. of America, 35 F. Supp. 820 (S.D.N.Y. 1940) affirmed without reference to the admission of evidence, 148 F.2d (2d Cir. 1945).
5. United States v. United Shoe Machinery Corp., 89 F. Supp. 349 (D. Mass. 1950).
6. American Rubber Products Corporation v. NLRB, 214 F.2d 47 (7th Cir. 1954).
7. Supra note 2.
8. Reily v. Pinkus, 338 U.S. 269 (1949).
9. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).
10. SED v. Harrison, 80 M. Supp. 226 (D.C. 1948).

proceeding before the SEC as for a proceeding in court and said in reference to the attorney-client privilege:

> That privilge has long been recognized as a very proper and necessary one to insure full and complete revelation by a person to an attorney to the end that the client may be properly advised, represented, and ,in appropriate cases, defended by that attorney.

Therefore, even in the absence of specific reference by the Administrative Procedure Act, it can be predicted that the Fedral Courts will uphold the attorney-client privilege in reviewing administrative hearings.

The Model State Administrative Procedure Act, first drafted in 1944 by the Commissioners on Uniform State Laws is the state counterpart to Federal Administrative Procedure Act. Originally, Section 9 of the Model State Act[11] provided a set of rules which dealt with evidence in contested cases brought before administrative agencies. Section 9 of the original draft has now become Section 10 in the fourth and latest draft[12] of the

11. Model State Administrative Procedure Act.
Handbook of the National Conference of Commisioners on Uniform State Laws 329 (1944).
Section 9. (Rules of Evidence: Official Notice.)
In contested cases:
(1) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.
(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.
(3) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.
(4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

12. Revised Model State Administrative Procedure Act. (Fourth Draft).
Section 10. (Rules of Evidence; Offcial Notice.) In contested cases:
(1) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in (on-jury) civil cases in the (District Courts of this State) shall be followed; but, where necessary to ascertain facts which cannot otherwise be proved, evidence not admissible under such rules may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be notde in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;
(2) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;
(3) a party may conduct cross-examination required for a full and true disclosure of the facts;
(4) notice may be taken of judicially cognizable facts. In addition, notice may

Model State Act. Patterned somewhat after the federal act, the State Act provides that irrelevant, immaterial, or undudy repetitious evidence shall be excluded. Section 10 further provides that the rules of evidence as applied in non-jury civil cases in the District Courts of the State shall be followed. This provision is probably questionable language, as there are no established rules of evidence for non-jury civil cases; at least if there are, they are hard to determine, as far as the better known authorities on the law of evidence are concerned.[13] The most significant provision in Section 10 is that evidence which is not admissible under the ordinary exclusionary rules will be admitted unless precluded by statute, if it is of a type commonly relied upon by reasonable, prudent men in the conduct of their affairs.[14] The fourth draft of the Model Act expressly recognizes the rules of privilege.[15]

Several states have administrative procedure acts patterned after Section 10 of the Model State Act. Wisconsin and Massachusetts have both adopted provisions on evidence which are substantially the same as the latest Model Act.[16] Colorado's provision dealing with evidence in administrative hearings is not completely satisfactory, as it retains the reference to the rules of evidence before non-jury civil cases and also does not make reference to the rules of privilege.[17]

As already noted in this symposium, Wyoming has not adopted any type of administrative procedure act. An examination of the statutes creating some sixty administrative agencies gives very little aid in determining what rules of procedure are followed by the administrative agencies in Wyoming in regard to evidence which will be admitted at hearings. Only three agencies have statutory provisions dealing with the rules of evidence. The statutes creating the Public Service Commssion provide that, ". . . the practice and rules of evidence shall be the same as in civil actions or suits in equity, except as otherwise herein provided."[18] In hearing before the Insurance Commission, Wyoming Statutes provide that, "Nothing contained in this Act (§§ 26-115 to 26-165) shall require the observance at any such hearing of formual rules of pleading or evidence."[19] The laws setting up the Blue Sky Commission declare that:[20]

> The rules of pleading and procedure in such actions shall be the same as are provided for by law for the trial of equitable actions

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be taken of generally recognized technical or scientific facts within the agency's specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, and they shall be afforded an opportunity to contest the facts noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the avaluation of the evidence.

13. 1 Wigmore, Evidence 141 (3d ed. 1940).
14. Supra note 11.
15. Supra note 11.
16. Wis. Law 1959, § 227.10; Mass. Law 1959, ch. 30A, § 11.
17. Colo. Law 1959, ch. 37, § 6.
18. Wyo. Stat. § 37-49 (1957).
19. Wyo. Stat. § 26-160 (1957).
20. Wyo. Stat. § 17-106 (1957).

> in the district courts of this state, and on the hearing the judge of said court may set aside, modify, or confirm said finding or findings as the evidence may require.

Two of these three statutes state that the rule of evidence and the procedure shall be the same as the rules for the trial of an equitable action. These rules are exclusive as the rules of evidence for non-jury civil cases, referred to earlier.

Thus, it is obvious that there is little or no uniformity in the rules of evidence prescribed by statute for Wyoming administrative hearings. In most cases, the statutes provide for hearings, subpoena power, and procedure upon appeal, but the job of drafting procedural rules as to evidence is apparently left up to the agency itself, since most statutes fail to mention such rules. A typical example of this is found in the laws establishing the Wyoming Aeronautics Commission and giving it power to hold investigations, subpoena witnesses, subpoena documents and papers, and make findings, but there is no reference made as to rules of evidence, privilege, right of cross-examination, right to present evidence or right to counsel.[21] Perhaps the legislature felt that the agencies could better draft their own rules of evidence and therefore felt the inclusion of such rules in the statutes to be unnecessary; however, this has not produced the desired results. This view was expressed by the Wyoming Supreme Court in a recent review[22] of a Board of Land Commissioners' decisions when the court said, "the Board of Land Commissioners has promulgated no rules or regulations of procedures as is contemplated by the Legislature." This statement by the Court may be a little hard since the Board of Land Commissioners adopted rules of procedure in 1925, but the court was justified in criticizing the Board since these rules are somewhat inadequate.

As evidenced by responses to questions asked of state agencies on a questionnaire prepared in conjunction with this symposium, only a few agencies have drafted their own rules. From a return of twenty-seven out of fifty-eight questionnaires sent, only three of the agencies indicated that they had drafted rules of evidence to be applicable in hearings held before their agencies. From these questionnaires, it can be determined that one agency recognizes no rules of evidence, while another is bound by the Universal Code of Military Justice. The remaining twenty-two agencies, all of which have hearing powers, have apparently not adopted any rules of evidence to be followed in hearings before their agencies.

The Wyoming Supreme Court has done a great deal to fill in the statutory deficiencies with respect to the rules of evidence under which the state administrative agencies should conduct their hearings. In 1941 the Wyoming Supreme Court, upon review of an action in mandamus in which the relator sought to compel a municipal officer to take affirmative action, quoted from an Illinois case:[23]

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21. Wyo. Stat. § 10-19 (1957).
22. Application of Hagood, Wyo. 356 P.2d 135 (1960).
23. Cowan v. State, 57 Wyo. 309, 116 P.2d 854 (1941); citing from People v. Higgens, 15 Ill. 110 (1853).

> They (the board of trustees of the state hospital) are not bound down by any legal rule of evidence when determining as to the existence of those qualifications for the purpose of making the appointment; nor, on the other hand, are they thus restricted when determining upon the absence or want of certain qualifications, when acting upon the question of removel; they may determine that question upon their own observation, and exercising their own best judgment, as well as upon facts detailed by others, or upon the opinions of witnesses.

So it appears that the Wyoming Supreme Court, at least in the area of determining qualifications of officers, has recognized that agencies making such determinations are not bound by the exclusionary rules of evidence. The Wyoming Supreme Court in *Lake De Smet Reservoir v. Kaufman*[24] stated that in reaching its determinations, a Board of Special Commissioners, in determining the rates for the sale of surplus water, must consider all relevant evidence and argument, and quoted from a United States Supreme Court decision:

> One of the most important safeguards of the rights of litigants and the minimal constitutional requirements in proceedings before an administrative agency vested with discretion, is that it cannot rightly exclude from consideration facts and circumstances relevant to its inquiry which upon due consideration may be of persuasive weight in the exercise of its discretion.

In this case the Supreme Court reversed a District Court ruling which excluded evidence in the form of books and papers which the Supreme Court held were admissible. The evidence would probably have been admitted, even under the strict exclusionary rules of evidence, but the Court, in citing from the United States Supreme Court case, recognized the value of allowing the administrative agencies to use their discretion in permitting all relevant evidence to be included.

In 1958 upon reviewing a decision from the Board of Land Commissioners[25] the Supreme Court of Wyoming stated:

> The findings of the Board if supported by substantial evidence should be approved by the court on the trial de novo and we think that such substantial evidence may consist of competent testimony either (a) taken before the board and properly preserved or (b) adduced in the trial before the court. . . .

In 1950 the Court in *J. Ray McDermott & Co. v. Hudson*[26] said again:

> A finding of the Board of Equalization, if supported by substantial evidence, should be approved by a district court on a trial de novo, and substantial evidence required may consist of competent testimony taken either before the Board and properly preserved, or adduced at trial before the court as in trial of a civil action.

24. 75 Wyo. 87, 292 P.2d 483 (1956) quoting from Pittsburgh Plate Glass Co. v. National Labor Relations Bd., 313 U.S. 146 (1941).
25. Rayburne v. Queen, 78 Wyo. 359, 326 P.2d 1108 (1958).
26. Wyo. 348 P.2d 73 (1960).

These were an unfortunate choice of words if they imply that evidence presented before an administrative hearing must be competent, because "competent evidence" is the phrase normally used to describe evidence which is admissible under jury-type rules. In drafting the Federal Administrative Procedure Act the word "competent" was used in Section 7 (c), but when the bill was finally passed, this word was omitted.[27] Nor does it appear in any section in the most recent draft of the Model State Administrative Procedure Act.

Section 10 of the fourth draft of the Model State Administrative Procedure Act allows copies of excerpts of documentary evidence to be admitted and also provides that the agencies shall give effect to the rules of privileges as recognized by law.[28] Neither of these points is covered in Section 7 (c) of the Federal Administrative Procedure Act.[29] Several states have adopted provisions similar to Section 10 of the Model State Administrative Procedure Act as to copies of documentary evidence and privilege, but these points are not covered by any Woyming Statute or court decision.

A comparatively early rule relating to evidence before administrative hearings was the "residuum rule." This rule, laid down in 1916 by the New York Court of Appeals,[30] in reviewing an award made by the Workman's Compensation Commission, is that there must be a "residuum of legal evidence" to support a finding by an administrative agency, legal evidence being that which is admissible in jury trials. A substantial number of states, and probably the federal courts as well, have rejected the residuum rule, while an even greater number have found ways to get around it.[31] The major objection is that the rule prevents the agency and the courts from giving the natural probative effect to evidence that has been properly admitted, for example, hearsay evidence which has been admitted without objection. In 1957 the Wyoming Supreme Court decided to cast its lot wtih the states which follow the residuum rule. In its review of a workman's compensation award,[32] the court said:

> In some of the states statutes have been enacted to the effect that the workman's commission shall not be bound by common law or statutory or technical rules of evidence. . . It has been held that under such statutes heresay evidence is admissible within certain limits. We need not examine in detail what these limits are. Suffice it to say here that it would seem hearsay testimony alone is not sufficient to establish any of the important and vital issues in a workman's compensation case.

27. Supra note 3.
28. Supra note 11.
29. Supra note 3.
30. Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 173 N.E. 507, Ann. Cast. 1918B, 540 (1916).
31. 2 Davis, Administrative Law Treatise 303, 317, 319 (1958).
32. Jennings v. C. M. & W. Drilling Co., 77 Wyo. 69, 307 P.2d 122 (1957).

OFFICIAL NOTICE

Section 7 (d) of the Federal Administrative Procedure Act provides in part:

> Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

This is the only provision in the Federal Act for official notice and by its application, parties to a hearing receive no information of any fact of which the agency may take notice in making its findings until after the decision has been reached. This means that to have a chance to rebut any fact of which an agency may have taken official notice, a party must do so on a petition for rehearing. Section 10 (4) of the fourth draft of the Model State Administrative Act has remedied this by providing:

> Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, and they shall be afforded an opportunity to contest the facts noticed. The agency experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

While most of the statutes creating administrative agencies in Wyoming and a majority of the rules of procedure adopted by such agencies fail to mention official notice, the Wyoming Supreme Court, in a Public Service Commission order,[33] ruled that the Commission was not limited to facts in the record and that it had a perfect right to consider information which was within its knowledge as a part of its own records and to draw a finding or conclusion from such information. A ruling based in part on facts of which the agency takes official notice will therefore be upheld, at least so far as the facts are taken from the agency's own records.

FINDINGS

Both the federal law and the statutes of the states are generally uniform on the requirements of findings of administrative agencies. Probably the most compelling reason to require findings is to facilitate judicial review. The United States Supreme Court felt that in order to be able to have proper review of administrative findings by the courts, the grounds upon which the administrative agency acted must be clearly disclosed.[34]

The Administrative Procedure Act in Section 8 (b) provides:

> The record shall show the ruling upon each such finding, conclusion or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact, law or discretion presented on the record; and (2) the appripriate rule, order, sanction, relief, or denial thereof.

33. Svilar Light & Power v. Riverton Valley Elec. Assn., Wyo. 355 P.2d 52.
34. SEC v. Chenery Corp., 318 U.S. 80 (1943).

The principal problem in regard to the requirements of this section is to what extent the agency must make separate findings. It is generally accepted under the Administrative Procedure Act that the agency does not have to make a separate finding on each exception, proposed finding, or subsidiary evidentary fact.[35]

Section 12 of the latest draft of the Model State Administrative Procedure Act provides:

> Any final decision or order adverse to a party in a contested case shall be in writing or stated in the record. Any final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If a party, in accordance with agency rules, submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

This section of the proposed act appears to be contra to the holdings under the Administrative Procedure Act and is apparently more preferable.

Although most of the Wyoming statutes creating administrative agencies with hearing powers provide that a record shall be kept of all proceedings, and that this record and the findings of the agency will be forwarded to the appellate court when an appeal is taken from the agency's decision, the statutes make no provision for the contents of the record. In 1945, on review of a Public Service Commission hearing, the Wyoming Supreme Court ruled that, even though it may not be reversible error, in order to comply with the statute requiring it to make and file a concise statement of its fact findings in its final order and decision, the court in contested hearings must be able to determine from the report what evidence the Commission considered credible and hence worth of adoption and what evidence it rejected in making its findings and decision.[36]

Seven years later, the Court in reviewing another Public Service Commission decision[37] said that they would not require specific findings but that they would consider the evidence and give to it every favorable inference which might be reasonably and fairly drawn to support the successful party. The Court subsequently held on review of a decision of a Board of Special Commissioners,[38] that the Board must set forth sufficient evidence to support their findings from which the reviewing court could rationalize their decisions.

In a recent decision[39] the Court criticized the Board of Land Commissioners for adopting a Commissioner's findings and for not making

35. Coyle Lines v. United States, 115 F. Supp. 272 (E.D. La. 1953).
36. Gore v. John, 61 Wyo. 246, 157 P.2d 552 (1945).
37. Application of Northern Utilities Co., 70 Wyo. 225, 247 P.2d 767 (1952).
38. Lake De Smet Reservoir Co. v. Kaufman, 75 Wyo. 87, 292 P.2d 482 (1956).
39. Application of Hagood, Wyo., 356 P.2d 135 (1960).

findings of their own. This is probably dicta by the Supreme Court of Wyoming which would require the administrative agency to make its own findings.

CONCLUSION

The rules as to what kind of evidence may be considered and the rules of official notice as well as the requirements of findings which might be applied by administrative agencies in Wyoming are somewhat unsettled. If, in the future, the Wyoming Legislature decides to enact the Model State Administrative Procedure Act, it should consider the possibility of excluding the refernce to the rules of evidence as applied in non-jury civil cases, and the possibility of including a section excluding privileged evidence.

JAMES P. CASTBERG