The Administrative Order

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THE ADMINISTRATIVE ORDER—The Distinction between its Interpretation and its Amendment: (With the Administration of the Pennsylvania Public Utility Law used as an Example).

By

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The administrative order is the basic medium through which the quasi-judicial administrative body exercises its power. In every instance where it is sought to control the actions of men by written law, the correct interpretation of words will frequently become a matter of controversy.

Often, however, the administrative order cannot be reasonably interpreted to serve the interests of one or more of the various parties affected by it. In this situation, the adversely affected parties will desire that the order be amended. (The word amendment in this note includes Rescission and revocation.)

The distinction between interpretation and amendment of administrative orders is not always clear. It is the purpose of this note to illuminate this distinction by a discussion of the problem as it arises in the administration of the Pennsylvania Public Utility Law.

The Pennsylvania Public Utility Law provides for separate proceedings to raise the issue of interpretation of Commission orders, on the one hand, and their amendment, on the other hand. Whether an order of the Commission has been violated (and this necessarily involves the question of interpretation) is determined under the provision of section 1001 of the Public Utility Law, which reads as follows:

"Section 1001. Complaints—The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission. Any public utility, or other person, or corporation, subject to this act, likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect.

"The commission, by regulation, may prescribe the form of complaints filed under this section."

Section 1007 of the Public Utility Law empowers the Commission to amend its orders; the text of this section follows:

"Section 1007. Amendment and Rescission of Orders.—The commission may, at any time, after notice and after opportunity to be heard as provid-

1 Act of 1935 P.L. 1053, as amended.
ed in the case of complaints, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders; but no such orders shall affect the legality or validity of any acts done by such person, corporation, or municipal corporation before service by registered mail upon such person, corporation or municipal corporation of the notice of such change."

Amendment

Under the practice of the Pennsylvania Public Utility Commission, the proceeding to amend an order of the Commission is usually denominated a "Rule to Show Cause Why the Order Should Not Be Amended, etc." If a private party seeks this remedy, he files a "Petition for a Rule," etc. Upon occasion the Commission has exercised this power in the form of a complaint. Sometimes the Commission has combined the two proceedings in a single action, entitled a "Rule to Show Cause Why the Certificate of Public Convenience Issued to Respondent Should Not Be Revoked and/or Other Penalties Invoked." This type of combined proceeding is illustrated by the recently reported cases of Rule against Robertson; Rule against Ruettger; and Rule against Nowalk, wherein the Commission threatened revocation of an order granting a certificate of public convenience because of repeated violations of the certificate, but concluded these proceedings by the imposition of fines without revocation of the certificates.

The powers of the Commission under Section 1007 of the Public Utility Law are very much like that of a court in opening judgment, and have been so compared by President Judge Orlady in Diehl v. Public Service Commission, only the Commission's powers are broader in that it may modify its orders to carry out policy, and not merely upon the showing of injustice to the petitioner. The Superior Court permitted the Commission to remove a restriction from a certificate of public convenience without additional evidence but merely because the Commission had changed its mind on policy, where both the restriction or the omission of it from the certificate were apparently to the mind of the court within reasonable administrative discretion. But this does not mean that an administrative tribunal can or does act arbitrarily, for its policies must be guided by the statutory standards laid down by the legislature and it must appear from the facts of the case, that the order of the Commission is in accord with these standards. See Public Utility Commission v. Lancaster Transportation Company for an interesting if complex discussion on

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5 28 Pa. PUC 67 (1949).
how general orders of the Commission do not avoid the requirement of supporting evidence, if this evidence required for the support of the Commission’s acts. Thus the Superior Court would not permit the Commission to approve the interchange operation of two carriers where there was no evidence that this was required by public necessity. See 28 PUC 492 (1950) for the Commission’s order on a prior complaint in this matter. In this case it is to be noted that the Court did not criticize the procedure of the Commission but its interpretation of its orders. The Court said at page 294: “The Commission has given too broad a meaning to “local area” of Class B carriers.”

The Commission has held that an order may be reopened to give a hearing to a party who did not have notice of the proceeding leading up to the order;9 or to revoke a certificate of public convenience where a certificate of public convenience was erroneously issued to a non-existent partnership.10 The power of the Commission to rescind an order granting a certificate of public convenience to a taxi operator because of continued violations of Commission orders was sustained by both the Superior and the Supreme Courts in Day v. Public Service Commission.11 And finally the Commission will not consider a petition for rescission of its order invoking its power under Section 1007 of the Public Utility Law where the petitioner has lost the right of rehearing or appeal by unexcused delay.12 Nor does the Commission consider it sufficient fraud on a protestant where the protestant withdraws his protest to an application in reliance upon an oral stipulation of the applicant, to justify reconsideration (i.e. amendment) of the rights granted to applicant.13

We will now consider whether a Commission order which has issued without adequate and competent supporting evidence, and which has been perfected by the passage of the prescribed time for appeal or rehearing, requires an amending order to remove its effectiveness.

The Superior Court has said that an order of the Public Utility Commission “will not be disturbed if based upon competent and relevant evidence unless it is so capricious, arbitrary or unreasonable as to amount to error of law or a violation of constitutional rights.”14 Similar language can be found in the opinions of the Superior Court in the cases of Beaver Valley Service Co. v. Public Utility Commission15 and Collins v. Public Service Commission.16 But in a later decision,17

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12 Application of Union Transfer Affiliated Co., 22 Pa. PUC 244 (1941).
16 84 Pa. Super. 58, 64.
the Superior Court phrased the rule in the negative form, which has broader implications; there the court said:

"The order to this extent is gratuitous and must be regarded as capricious or arbitrary since evidence to support it is lacking."

The Public Utility Commission, relying on the Leaman case, supra, likewise stated the rule in the negative form in its order in the case of Application of Sangigni:18

"The Commission had no authority to issue a certificate for the transportation of general property since neither the application nor the proofs comprehended such grant."

Despite the implications in these latter two cases that an order without sufficient supporting evidence is void, this writer believes that the proper interpretation of these decisions is that all orders issued by an administrative tribunal must be presumed to be supported by sufficient evidence, and as such are merely voidable.

In brief, an order of an administrative tribunal cannot be collaterally attacked on the ground of insufficient evidence, but must be directly attacked through a proceeding to amend the order because it lacks sufficient competent supporting evidence.

The case of Armour Transportation Corporation v. Public Utility Commission19 states clearly that an administrative tribunal cannot make an order in any proceeding in which the parties thereto did not have notice at the pleading stage of the "issues raised." Now if the purpose of a proceeding is to amend a Commission order, notice should be given to the respondent that one of the remedies sought against the respondent therein is the amendment of a particular Commission order. And of course, one of the ways in which notice of the "issue" of amendment can be given would be to bring the proceeding in a form appropriate for amendment, namely a Petition for a Rule to Show Cause under section 1007 of the Public Utility Law.

But in a recent unreported order, the Public Utility Commission has indicated that it will not insist upon such a remedy being sought in this form, and that it will entertain the question of amendment in a complaint proceeding. In its order in the case of Heilman v. Grimm20 the respondent sought to have the complaint dismissed because—

"the question of the validity of the authority granted by (the) Commission is improperly raised in a complaint proceeding."

In reply the Commission said:

"In regard to the Complainant's contention of mistake in the order of April 13, 1937, while a more proper way to raise the issue of mistake is by a rule to show cause invoking the Commission's powers in Section 1007, of the Public Utility Law, nevertheless, since in the instant case the record

20 C-14761, (January 3, 1951).
fully covers the issue, and no party would be prejudiced by the Commission's consideration of the issue of mistake, we will consider it accordingly."

Although it thus appears that the Commission may amend its order in a complaint proceeding, the question remains whether this would be proper if the parties did not have notice either by the pleadings, or by full and fair treatment of the issue at the hearing stage.

In this regard, the Commission's order in the Application of Sanguigni is of interest, for the Commission took care to point out that its order therein "did not change or alter the certificate in any way," when, as the proceeding was before the Commission on a Rule to Show Cause, the respondent may have been put on notice that the Commission would consider, among other things, the question of amendment of the certificate of public convenience. But the reasons cited by the Commission in its Rule were "violations," so that it may be said the questions of amendment on grounds of policy or evidence were not among the "issues raised.

**Interpretation**

Although this writer has not found any support in the reported decisions of the Pennsylvania Public Utility Commission, or in Pennsylvania Court opinions, this writer maintains that the parol evidence rule applies to the interpretation of administrative orders. The parol evidence rule as applied to administrative orders means that administrative orders are to be interpreted from the language of the order without the aid of reference to any other document or evidence, except for well-recognized exceptions to the parol evidence rule, among the most notable being ambiguity and special usage of the words in the field of regulation. The administrative body, being a part of the state, is especially bound by the rule of good faith, and thus it should abide by the strict letter of its word without equivocation.

A result of applying the parol evidence rule to administrative orders is that the administrative body should not re-examine the evidence which is the basis of the administrative order in arriving at an interpretation of the order, unless permitted by the recognized exceptions of the parol evidence rule. If this were not so, and the administrative tribunal could go rummaging through its files for material in support of its desires, a most unfortunate situation would be created whereby a party would be unable to consider and refute the contentions by which the administrative body supported its desires.

Also the reconsideration of evidence would violate the principle of administrative res adjudicata. The testimony and arguments should be considered merged in the administrative order.

In the opinion of this writer the reconsideration of the evidence supporting an administrative order, as an aid in its interpretation, would violate the rule laid

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down by the Superior Court in *Armour Transportation Company v. Public Utility Commission*\(^2\) in that complaints brought by the Commission under Section 1001 of the Public Utility Law must give "a specific designation of the issue raised or charges made" in the complaint itself so that the respondent may prepare himself for the hearing.

In practice, however, counsel do not concern themselves in the conduct of the hearing involving the interpretation of a Commission order as to what prior supporting evidence may be considered by the Commission, for almost invariably counsel will move to incorporate into the record by reference the testimony of all prior proceedings before the Commission which might be remotely connected with the controversy in the hope that the Commission will consider this testimony in the making of its decision.

It may be noted that the Commission has ruled that it may lay down general interpretations of its orders to determine whether violations have been committed and is not restricted to determining whether this or that act complained of is a violation of the order. Of course, such a procedure could be abused so that orders could be amended under the pretense of "interpretation," but no such instance appears in the reported decisions of the Commission. In the *Application of Sanguigni*\(^3\) the respondent urged that the Commission improperly laid down in its prior order reported at 25 Pa. PUC 535 (1946), the following general interpretation of its certificate of public convenience:

"he (the respondent) must understand, however, that his right to transport, under this certificate, is restricted to such property as requires trucks, or trailers of special design, such as winch trucks, reach or pole trailers, and low-bed carryalls."

The respondent contended the Commission should have confined itself to:

"An investigation of the specific transportation movements described therein for the purpose of determining if said transportation movements constitute a violation of your petitioner's certificate of public convenience, and * * * the imposition of such penalties as the Commission may prescribe."

To this contention, the Commission replied:

"It would be manifestly impossible to make such a determination without interpreting the certificate of public convenience. * * * The order did not change or alter the certificate in any way." (Italics added.)

An important distinction between a complaint under Section 1001 of the Public Utility Law and a rule under Section 1007 thereof, is that a complaint, filed under Section 1001 of the Public Utility Law, like the initial pleading in an action

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\(^3\) 26 Pa. PUC 404 (1947).
at law, invokes the jurisdiction of the Commission in such a way that the Commis-
sion cannot evade the hearing of the case. But the grant of a rule to show cause by
the Commission under Section 1007, being analogus to a motion to open judgment,
as we noted, is a matter of favor and cannot be commanded from the Commission
as a matter of right.

Conclusion

The issue ultimately is one of whether there is notice and hearing of the issues
which the administrative tribunal purports to adjudge. Such notice may be given
either by the form of the proceeding, or by the "theory of the case" from facts
set forth in the pleadings. In the early history of the law the "form" of action was
the means by which the parties were notified of the issues to be raised against them,
but of late, the trend in the law has been to consider it sufficient if the notice of
the facts which support the desired remedy are brought to the attention of the ad-
verse party. Of course "fact" pleading, as opposed to "form" pleading, places a
greater burden on the defense attorney, for not only must the defense attorney
apprise himself of the facts, but in addition he must infer all the remedies which
such facts might sustain, and be prepared to defend against all of them.

Although there is much to be said on behalf of "form" pleading, it appears
more and more that the trend is towards "fact" or "notice" pleading, and the re-
cent proceedings before the Pennsylvania Public Utility Commission seem to be
indicative of this tendency in our jurisprudence. Under the influence of such a trend
(or perhaps even necessity) in our jurisprudence, it seems that it is futile for the at-
torney in the long run to insist on the logical nicety of distinctions between "equit-
able" and "legal" proceedings and to insist upon their separation procedurally.
The evil against which the attorney must protect his client, and which the ad-
ministrative tribunal must restrain itself from perpetrating, is the consideration
by administrative tribunals of facts or issues not placed before them, or facts not
relevant to the issues placed before them.