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THE RIGHT TO REVIEW AT THE AGENCY LEVEL— RECENT FEDERAL LEGISLATIVE CHANGES

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Perhaps the most impressive governmental phenomenon to occur in the last thirty years has been the tremendous growth of administrative bodies in the United States. The government agencies, boards, commissions (or whatever other name by which they may be designated) presently extant greatly affect the everyday life of the individual citizen in the United States. Because these agencies do exert such a great influence upon the persons or industries which they regulate and also upon the citizens whom they represent, the decisions which they render and the manner in which these agencies operate have become of prime importance. This being the case, the agencies have come under close scrutiny from the bar and the executive, legislative and judicial branches of our government, and there have been myriad suggestions made concerning additions to and deletions from the administrative process in order to insure protection to all concerned and to improve the administrative process wherever and however possible.

One of the most recent critiques of the administrative process was prepared by Judge James M. Landis at the request of then President-Elect John F. Kennedy and submitted to Mr. Kennedy in December, 1960.[1] In this report the Judge analyzed seven of the so-called independent agencies from the standpoint of the procedures employed by them in handling cases and conducting trials and appeals from initial decisions of trial examiners. He also made many recommendations[2] to the President for changes in the ad-

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1. CHAIRMAN OF THE SUBCOMM. ON ADM. PRACTICE AND PROC., SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960). (Hereinafter cited as "Landis Report.")

2. Among the recommendations were:

(1) That Congress should authorize the President to propose reorganization plans pursuant to powers granted by the Reorganization Act of 1949, subject to a veto by a concurrent resolution of both Houses of the Congress.

(2) That a reorganization plan be proposed for the Interstate Commerce Commission and the Federal Power Commission with the tenure of the Chairman being at the pleasure of the President.

(3) That a reorganization plan be proposed for the Interstate Commerce Commission, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission, the National Labor Relations Board, the Federal Trade Commission and the Securities and Exchange Commission clearly extending to the Chairman authority over all administrative matters within the agency.

(4) Create within the Executive Office of the President with appropriate powers an Office for the Oversight of Regulatory Agencies which will assist the President in discharging his responsibility of assuring the efficient execution of those laws that these agencies administer.

ministrative process which he felt would aid in eliminating much of the confusion, duplication and regulatory lag which has been and is the concern of all parties involved in the administrative morass. It is the intent of this Article to discuss in general the procedures utilized to obtain review by members of an agency of initial decisions of a hearing examiner, the suggestions of Judge Landis for reform of these procedures, some of the procedures which have been changed, and the feasibility and correctness of the suggestions.

At the outset, review of a decision issued by a hearing examiner is governed by section 8 of the Administrative Procedure Act.[3] In all cases wherein a hearing examiner has heard the evidence, taken testimony and rendered a decision, section 8 of the act prescribes the procedure to be employed in a review of this decision by the agency. Section 8(b) requires that prior to each recommended, initial or tentative decision,[4] or decision upon agency review of the decision of subordinate officers, the parties must be afforded an opportunity to submit for the consideration of the officers participating in such decision "(1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions." Typically, a hearing examiner appointed pursuant to section 11 of the Administrative Procedure Act[5] renders a decision in a case. Exceptions are filed by the parties with the agency heads, oral argument is had thereon, and a decision is rendered by the agency heads affirming or reversing the decision in whole or in part.

In keeping with the requirements of section 8(b) the agencies have enacted rules and regulations regarding the manner of submission of proposed findings, exceptions and supporting reasons for the exceptions,[6] so

3. 60 Stat. 242 (1946), 5 U.S.C. § 1007 (1958).

4. Section 8 distinguishes between "recommended," "initial" and "tentative" decisions, the persons required to render such decisions, and the method of appealing such decisions.

5. 60 Stat. 244 (1946), 5 U.S.C. § 1010 (1958).

6. For example, Section 1.149 of the General Rules of Practice and Procedure of the Federal Communications Commission states:

> *Proposed findings and conclusions.* (a) Each party to the proceeding may file proposed findings of fact and conclusions, briefs, or memoranda of law: Provided, however, that the presiding officer may direct any party other than Commission counsel to file proposed findings of fact and conclusions, briefs or memoranda of law. Such proposed findings of fact, conclusions, briefs, and memoranda of law shall be filed within 20 days after the record is closed, unless additional time is allowed.

Section 1.154 of the General Rules of Practice and Procedure of the Federal Communications Commission states:

> *Exceptions; oral arguments.* (a) Each exception to an initial decision or to any part of the record or proceeding in any case, including rulings upon motions or objections shall point out with particularity alleged errors in the decision or ruling and shall contain specific references to the page or pages of the

that the attorney practicing before the various agencies must be aware of the rules under which he is operating. Suffice it to say that, in general, when an appeal of an examiner's initial decision is made to an agency, the agency requires submission of specific exceptions to specific findings and conclusions of the hearing examiner, and also the submission of proposed findings and conclusions which the appealing party contends are correct. Any exceptions not made to specific findings are waived. In some agencies a brief or memorandum in support of the exceptions and proposed findings may be filed.[7] The appeal procedure to the heads of an agency from the decision of a hearing examiner is thus, in most of the larger administrative cases, most lengthy, arduous, burdensome and expensive to prepare. Of necessity, if the case presented before the hearing examiner encompasses 10,000 to 20,000 pages of testimony and several hundred exhibits, in order

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transcript of hearing, exhibit or order if any on which the exception is based. Any objection not saved by exception filed pursuant to this section is waived. The exceptions should be concise and they will not be accepted if they contain argumentative matters or discussion of law . . . .

(b) Within the period of time allowed in § 1.153(a) for the filing of exceptions any party may file a statement in support of an initial decision in whole or in part, which shall be similar in form to a statement of exceptions.

(c) Exceptions or supporting statements may be accompanied by a separate brief or memorandum of law in support thereof. Except by special permission, such brief or memorandum of law will not be accepted if it exceeds 50 double spaced typewritten pages in length. Within 10 days, or such other time as the Commission may specify, after the time for filing exceptions has expired, any other party may file a reply brief to which the same limitation of length applies.

Section 1.31 of the Rules of Practice and Procedure of the Federal Power Commission regulates the manner in which exceptions are to be filed. The section reads as follows:

(a) *Exceptions, filing of.* Any party or staff counsel desiring to appeal to the Commission may, within 20 days after the service of a copy of an intermediate decision (initial or recommended by subordinates, or tentative by Commission), or such other time as may be fixed by the Commission, file exceptions thereto.

(b) *Exceptions, nature of.* Exceptions to findings and conclusions of fact shall specify the particular statements or parts to which exception is taken; shall designate by special references, the portions of the record relied upon in support of such exceptions, shall set out specific findings and conclusions proposed in lieu thereof; and shall include any proposed additional findings and conclusions of fact. Exceptions to conclusions of law shall be specific; shall briefly cite the statutory provisions or the principal authorities relied upon; shall set forth conclusions suggested in lieu thereof; and shall include any proposed additional conclusions. Exceptions to the form of order or rule shall specify the portions thereof excepted to, and shall set forth a form of order or rule suggested in lieu of that served. Supporting reasons for the exceptions, may, if desired, be submitted in a separate document.

(c) *Failure to except results in waiver.* Failure to file exceptions within the time allowed under this section shall constitute a waiver of all objections to the intermediate decision served. No matter not included in the exceptions filed as provided in this section may thereafter be objected to before the Commission upon brief or oral argument, or in any application for Commission rehearing; and any matter not included in such exceptions shall be deemed waived. Exceptions covering rulings admitting or excluding evidence not objected to at the time the rulings were made, will be unavailing.

7. See note 6 *supra*.

fully and fairly to present such a case to the agency heads much time and effort must be expended. Cases of such proportions are not unusual in many of the federal agencies, particularly the Federal Power Commission, Federal Trade Commission, Federal Communications Commission and the Civil Aeronautics Board. After these various documents are filed, there is usually an oral argument on the merits presented to the agency heads by the petitioners. The time allowed by the various agencies for such argument varies from several days to as little as ten minutes.[8] As already stated, after the case is submitted to the agency heads a decision is then rendered by them, affirming or reversing in whole or in part the decision of the hearing examiner.

Judge Landis had this to say of such a procedure which is followed in general by the Interstate Commerce Commission:

> Whether a reorganization plan could make final the decisions by single Commissioners, hearing examiners, or employee boards in certain groups of cases might be debatable, but a reorganization plan could make them final subject to review akin to the selective review by certiorari now employed as the means by which the Supreme Court of the United States determines which decisions of the Circuit Courts of Appeal it wishes to review. A judicious use of such a scheme and an insistence of brief petitions for certiorari by counsel would cut down enormously the business demanding attention at the Commission level. The legality of such a plan under the concepts of due process is not truly questionable.[9]

The reasoning of Judge Landis is that there is a great deal of time involved in having the agency heads review practically every decision which is rendered by a hearing examiner and this time could be utilized by the agency heads for more constructive purposes. Further, the time lag, which can entail several months, which parties must bear while awaiting their case to come up for review by the agency heads, is also a most serious consideration in the existing appeal procedure. Therefore, rather than review every decision of a hearing examiner the agency heads should be

8. For example, in a certificate case involving air line service to a designated service area the Civil Aeronautics Board ordinarily grants 30 to 45 minutes to air carriers seeking certificates, 20 minutes to intervening air carriers and 5 to 10 minutes to civic parties seeking to obtain or retain service. The Federal Power Commission, in a case involving the setting of rates for a natural gas company which involves some important principles of rate regulation, might grant 45 minutes to 2 hours to the applicant company and up to 30 minutes or more to intervenors depending upon their interest and stake in the proceeding. The Federal Communications Commission ordinarily grants 20 minutes to each applicant in a comparative television application case involving two or more applicants. However, there are variances in each agency regarding the amount of time granted for oral argument, depending upon the importance of the issues in the case and the number and the interest of the parties involved.

9. Landis Report, *supra* note 1, at 40.

selective in reviewing decisions, utilizing the certiorari type of review which would permit them to review only those decisions which they felt were of significance or were perhaps incorrectly decided by the hearing examiner.

An analysis of Judge Landis' proposal shows it to have merit, if certain safeguards are in existence. At the outset, Judge Landis includes in his recommendation for limited administrative review by agency heads a recommendation that "No effort should be made to affect the existing scope of judicial review."[10] This should definitely be a *sine qua non* for institution of a certiorari type of agency review. It is the author's opinion that there should be more, not less, judicial review of administrative agencies' decisions. Were there no judicial body to exercise restraint over the various administrative bodies and to insure that the intent of the legislature is carried out by these administrative bodies, the possibility exists that they could run roughshod over the rights of many individuals and industries whom they are charged by the legislature to regulate. The courts stand as a bulwark and an effective check upon administrators who fail to recognize the requirements of due process and the other safeguards of personal rights which are guaranteed under the laws of this country.

The proposal of Judge Landis has merit for additional reasons. One of the most frustrating and perhaps most serious problems facing the attorney who represents a client before one of the administrative agencies is the appellate procedure. Testimony and exhibits can be of stupendous proportions and the time, effort and expense involved in pursuing the appeal is great. Also, there is a highly valid criticism that after the hearing examiner has heard numerous witnesses and studied numerous exhibits, written a lengthy opinion and rendered a decision, the commission, after hearing an oral argument consisting of from thirty minutes to a few days and studying the briefs and exceptions, is less capable of arriving at a well-reasoned decision. This is not meant to imply that the agency heads are incompetent, but only that it is impossible to make the required study upon which a well-reasoned decision should be based. Unlike the various courts to which an appeal from an agency decision is taken, the agency heads are not equipped with the personnel or the time adequately to consider the appeals. Thus some other body which is specially designated to handle these matters should hear the appeal and the commission should hear only special cases. Therefore, machinery to curtail the amount of time consumed by agency heads in deciding every case in which a losing party desires to appeal is in order. Since the recommendations of Judge Landis were rendered to the President, a beginning has been made in this direction.

10. Landis Report, *supra* note 1, at 65-66.

On August 31, 1961, Congress enacted Public Law 87-192,[11] which amended certain sections of the Communications Act of 1934, as amended.[12] Prior to the enactment of P.L. 87-192, the Federal Communications Commission was required to hear every adjudicatory case in which a party filed a proper appeal from the initial decision of a hearing examiner. Much time is consumed by this procedure—time both of the participants and the Commissioners. As the Report of the Committee on Commerce[13] showed, it was necessary for the Federal Communications Commission to hear every adjudicatory case "including such matters as fishing boat suspensions or the most routine aural broadcast case."[14] P.L. 87-192 has amended section 5(d) of the act as follows:

(1) Section 5(d)(1) of the Communications Act of 1934, as amended, now permits the Commission to "delegate any of its functions to a panel of Commissioners, an individual Commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, and may at any time amend, modify, or rescind any such rule or order."[15] However, this section also requires that there be no change in the requirement contained in section 7(a) of the Administrative Procedure Act[16] that hearings in cases of adjudication must be presided over by the agency, one or more members of the body which comprises the agency, or one or more examiners as provided in the act.

(2) Any person aggrieved by an order, decision, report or action of the board may file an application for review of the action by the Commission.[17] The Commission is required to pass upon the application for review and it may grant the application in whole or in part or deny the application without specifying any reasons therefor.[18]

(3) The party seeking review by the Commission cannot rely upon any questions of fact or law upon which the intermediate review board has been afforded no opportunity to pass.[19]

(4) In the event the Commission grants the application for

11. 75 Stat. 420-23 (1961), 47 U.S.C. §§ 155(d), 402, 405, 409 (Supp. III, 1961).
12. 48 Stat. 1064 (1934), 47 U.S.C. §§ 151-609 (1958).
13. S. REP. No. 576, 87th Cong., 1st Sess. (1961).
14. *Id.* at 8.
15. 75 Stat. 420 (1961), 47 U.S.C. § 155(d)(1) (Supp. III, 1961).
16. 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1958).
17. 75 Stat. 420 (1961), 47 U.S.C. § 155(d)(4) (Supp. III, 1961).
18. 75 Stat. 420 (1961), 47 U.S.C. §§ 155(d)(4)-(5) (Supp. III, 1961).
19. 75 Stat. 420 (1961), 47 U.S.C. § 155(d)(5) (Supp. III, 1961).

review it may affirm the order, set it aside or order a rehearing upon the order in accordance with new section 405 of the act.[20]

(5) Judicial review of any order or decision rendered by the intermediate review board is granted by section 5(d)(7)[21] of the act and a prerequisite for obtaining judicial review is the filing of an application for review of the intermediate appeal board's order with the Commission.[22]

(6) Section 5(d)(8)[23] of the act requires that the Commission employ only qualified, trained and experienced personnel to act as members of the intermediate appeal board and in no event can any such member be in a grade classification or salary level lower than the employee or employees whose action is being reviewed.

Section 405 of the act[24] deals with petitions for rehearing of orders issued by the Commission or the intermediate appeal board. In general any party aggrieved has the right under this section to file with the intermediate review body a petition for rehearing of the order issued by this body. However, the filing of such a petition is not a prerequisite (except under certain conditions)[25] for judicial review of the order as is the requirement for the filing of a petition for review of the order with the Commission. In other words, the petition for rehearing is another avenue which a party can travel in the review procedure but one which is not required to obtain review of an order. Also, when a petition for rehearing is filed the Commission, or the intermediate review board, must enter an order concisely stating the reasons why the petition is granted or denied.[26] This is unlike section 5(d)(5)[27] which permits the Commission to deny an application for review without specifying any reasons.

Sections 409(a), (b), (c) and (d)[28] of the Communications Act of 1934 have also been amended and set forth generally the procedure to be followed in filing an appeal to the Commission or the review board of an

20. 75 Stat. 420 (1961), 47 U.S.C. § 155(d)(6) (Supp. III, 1961).
21. 75 Stat. 421 (1961), 47 U.S.C. § 155(d)(7) (Supp. III, 1961).
22. *Ibid.*
23. 75 Stat. 421 (1961), 47 U.S.C. § 155(d)(8) (Supp. III, 1961).
24. 75 Stat. 421 (1961), 47 U.S.C. § 405 (Supp. III, 1961).
25. Section 405 of the act provides in pertinent part:
The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.
26. 75 Stat. 421 (1961), 47 U.S.C. § 405 (Supp. III, 1961).
27. *Supra* note 19.
28. 75 Stat. 422 (1961), 47 U.S.C. §§ 409(a)-(d) (Supp. III, 1961).

initial decision rendered by a hearing officer. This procedure is quite similar to the manner in which appeals are presently taken to the Commission; *i.e.*, exceptions to the decisions and memoranda in support of the exceptions are filed either with the Commission or to the body delegated by the Commission to pass upon the exceptions.

In essence, then, the new amendments preserve the right of a party to seek review of an initial decision rendered by a hearing officer, either by the Commission or by a review board designated by the Commission. After the review board renders its decision, the party has the right to seek a rehearing before that board or to seek a review by the Commission of the review board's decision. The Commission can grant the review and hear the case, deny it without comment or return it for rehearing to the review board. In the event the petition for review is denied by the Commission the party then has the right to seek judicial review thereof by the courts. Further, the initial hearing phase of the proceeding has not been altered in that the same persons will hear a case as prior to the new amendments. The entire procedure seems to meet the requirements of due process as well as to relieve the Commission of the burdensome duty of hearing appeals on every adjudicatory decision, thus freeing the Commissioners for other duties and also expediting the case for all parties concerned.

The Commission has by rule effectuated the provisions of P.L. 87-192. On June 8, 1962, the Commission issued an order[29] establishing a review board and delegating authority to such a board. It did so by amending its Rules of Practice and Procedure[30] and its Statement of Delegations of Authority.[31] The amendments were made effective on August 1, 1962. By its order it designated four persons to be members of the review board and it delegated specific duties to the board. The board is to take original action on certain interlocutory matters[32] which were previously acted upon by the Commission, the Motions Commissioner or the Chief Hearing Examiner. In addition to these duties, the review board is to review all exceptions to initial decisions in practically every adjudicatory case with the exception of a comparative television application case, *i.e.*, a case wherein more than one applicant is seeking to obtain a license to operate a television station. The order delegating the authority to the review board includes

29. 27 Fed. Reg. 5671 (1962).
30. 27 Fed. Reg. 5660 (1962).
31. 27 Fed. Reg. 5671 (1962).
32. A few examples of such matters are (1) petitions to amend, modify, enlarge, or delete issues upon which the hearing was ordered; (2) petitions to intervene; (3) requests for leave to file additional pleadings provided for in § 1.13 of the Commission's rules; (4) petitions by adverse parties requesting dismissal of an application; and (5) dismissal of cease and desist, suspension and revocation proceedings.

the right to petition the Commission for review of the board's action, and in keeping with the amendments to the act, the Commission has the right to grant or to deny such petition for review without specifying reasons for the action taken. The rule further states that all cases encompassed in the order are to be reviewed by the board and that no petition for review directly by the Commission will be entertained once it has designated the case for a hearing and review by the board. A party, however, may petition the board to certify the case to the Commission for decision.

It can thus be seen that at least one administrative body has been granted the right by Congress to expedite its work load by lessening the time required by the body to handle appeals. Since the venture is relatively new, only time will tell whether it will be successful.[33]

Another piece of legislation of importance in the administrative law field is a bill[34] introduced by Senator Everett Dirkson on June 1, 1962, to amend the Administrative Procedure Act as it applies to all administrative agencies. Section 107(c) of the bill proposes to amend the existing section 8 of the Administrative Procedure Act[35] as follows:

> (1) Within twenty days from the service upon a party of an initial decision by a hearing officer, a party has the right to file an appeal of the decision with an "agency appeal board." The bill requires that this appeal board shall consist of one or more panels each composed of one or more agency members or one or more examiners from an "appellate roster." This board may affirm, modify or deny the appeal and if its action is not reviewed by the agency it becomes the final decision of the agency.

33. There has also been other recent legislation passed by Congress which affects some of the other federal administrative agencies. Reorganization Plan No. 4 of 1961, 75 Stat. 837 (1961), authorized the Federal Trade Commission to delegate its functions to a division of the Commission or others, including an employee board. The FTC has not, however, delegated any adjudicative functions to employee boards under this authority, but has instituted a certiorari type of review.

The Civil Aeronautics Board utilizes a certiorari type of review (unless two or more members of the Board feel that review is essential) and the Board has also delegated authority in nonadjudicatory matters to its staff, under the authority granted to it under Reorganization Plan No. 3 of 1961, 75 Stat. 837 (1961). It has not established any employee boards under this authority.

The Federal Maritime Commission has been granted the right to delegate functions to an employee board by virtue of section 105 of Reorganization Plan No. 7 of 1961, 75 Stat. 841 (1961). The FMC has established an employee board to pass on certain matters.

On September 14, 1961, section 17(5) of the Interstate Commerce Act was amended by Public Law 87-247, 75 Stat. 517 (1961), 49 U.S.C. § 17(5) (Supp. III, 1961), to authorize the ICC to delegate functions to an employee board. Under this authority the ICC has established employee appellate boards.

34. S. 3410, 87th Cong., 2d Sess. (1962). No hearings were held concerning this bill in the 1962 session of Congress; therefore, the bill will have to be reintroduced at the next session.

35. 60 Stat. 242 (1946), 5 U.S.C. § 1007 (1958).

(2) The bill also provides for the filing of an application for review of a hearing officer's decision directly with the agency, thereby waiving the right to appeal to the review board. This language is not included in P.L. 87-192[36] and the Federal Communications Commission has precluded such action by rule.[37]

(3) The agency may grant the application in whole or in part or deny the application without specifying any reasons. If granted, the agency may affirm, modify, set aside or remand the decision and it must state its reasons for doing so.

(4) There is no right of oral argument unless the agency prescribes it.

(5) The right to judicial review of the agency's decision is preserved in section 108 of the bill, which amends section 10(a) of the Administrative Procedure Act[38] permitting review by the courts.[39]

The similarities between the legislation specifically affecting the Federal Communications Commission and the legislation proposed to amend the Administrative Procedure Act can be seen from the foregoing. The "review board" concept, the right of the Commission to deny an appeal with no reasons stated, and the other procedures embraced within the two acts carry forward the concept of an intermediate appellate body, the certiorari type of review by an agency, and judicial review thereafter.

It is to be hoped that the procedure will be a success and that it will be a step forward in relieving the regulatory lag presently extant in the administrative bodies to the benefit of all parties involved.

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36. *Supra* note 11.
37. See discussion at p. 60 *supra.*
38. 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1958).
39. It would appear from the language of Section 108 that the right to review might be somewhat restricted because of the language of the section which permits judicial review of "any reviewable agency action."