Denver Law Review

Volume 29 | Issue 12 Article 4

January 1952

Right of Cross Examination before Administrative Agencies in Colorado

Wesley H. Doan

Right of Cross Examination before Administrative Agencies in Colorado

RIGHT OF CROSS EXAMINATION BEFORE ADMINISTRATIVE AGENCIES IN COLORADO

WESLEY H. DOAN *

There is, in the Colorado Constitution, no article or provision which specifically provides for cross examination in hearings before Colorado administrative agencies. However, this right may be inferred from the due process clause of the Constitution,[1] and it is a right which is zealously guarded by the courts with regard to both judicial proceedings and proceedings before administrative agencies.

Colorado is among those states which allow the administrative agencies to use their own prerogative in adoption of the common law rules of procedure. There is very little statutory or case law upon the subject of cross examination and rebuttal before administrative agencies in Colorado. However, from what the author was able to ascertain from the reported cases on the subject, it appears that the agencies and the courts will protect this fundamental right.

Statutory Recognition of Right

In the establishment of the Workmen's Compensation Commission in Colorado, the legislature provided for cross examination in hearings before the Commission. In the section entitled Rules of Evidence-Procedure [2] it is provided that:

> Such commission or persons by it duly designated, shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure other than herein or by the rules of the commission provided, but may make such investigations in such manner as in its judgment are best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this article.

This section shows the power of the Commission to set its own rules of procedure. However, in *Hearings—Notice—Evidence—Order,*[3] it is provided that:

> Either party shall have the right to be present at any hearing [and] . . . shall have the right of cross examination. . . . All *ex parte* testimony shall be reduced to writing and either party shall have opportunity to rebut the same in final hearing.

Statutory authority establishing the right of cross examination and rebuttal in hearings before the Public Utilities Commission is set out in the article which sets up the Commission.[4] It is

---

* Student, University of Denver College of Law.

[1] Colorado Constitution, Art. II, sec. 25.

[2] 1935 COLO. STAT. ANN., c. 97, sec. 24.

[3] *Op cit.*, sec. 37.

[4] 1935 COLO. STAT. ANN., c. 137, sec. 46.

there stated that:

> At the time fixed at any hearing before the commission, any commissioner or examiner, or at the time to which the same may have been continued, the applicant, petitioner, complainant, the person, firm or corporation complained of, such persons, firms, or corporations as the commission may allow to intervene and such persons, firms, or corporations as may be interested in or affected by any order that may be made by the commission in such proceedings shall be entitled to be heard, examine and cross-examine witnesses and introduce evidence. . . . All persons shall be entitled to be heard in person or by attorney.

Thus it may be seen that there exists statutory right to cross examination and rebuttal in hearings before two of the largest and most important commissions in the state.

Judicial Protection of Right in Colorado

The Colorado Supreme Court has, in the cases before it on the subject, protected this right. In *Denver & S. L. R. Co. v. Chicago B. & Q. R. Co.*,[5] a rate making case before the Public Utilities Commission, the court stated:

> The commission is an administrative body, and where it acts in a *quasi*-judicial capacity it is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties.[6] "But the more liberal the practice in admitting testimony, the more imperative the delegation to preserve the rules of evidence by which rights are asserted and defended." All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or assert its defenses.

In *Snell v. Public Utilities Commission*,[7] another case before the Public Utilities Commission of Colorado, the court protected the right of presenting evidence in rebuttal. The plaintiff carrier applied to the commission for a permit to operate certain sightseeing busses. A hearing was held and intervenors appeared in protest to the issuance of the permit. The permit was granted with no limitation as to the number of vehicles to be used. A petition for a rehearing was filed, and in oral arguments on the petition it was denied, but at the same time and in the same order denying the petition for rehearing, the commission purported to amend and modify the previous order. The court held that the

[5] 64 Colo. 229, 171 P. 74.

[6] Interstate Commerce Commission v. Baird, 194 U. S. 25; Interstate Commerce Commission v. Louisville & Nashville Ry Co., 227 U. S. 88.

[7] 108 Colo. 162, 114 P. 2d 563.

orders of the commission must be just and reasonable and in accordance with the evidence. If the modified order had been allowed to stand, it would have in effect denied the petitioners the right to cross examine the evidence from which the commission modified its original order or to present evidence in rebuttal to it. The carrier would have been denied due process as a consequence. In a round-about way the court upheld these rights of the petitioner. The court found that such action was unjust and unreasonable.

In a proceeding wherein an unusual result was reached by the commission, the state was held to have been denied the opportunity to rebut a change of mind by the Workmen's Compensation Commission in the *Allen* case.[8] In a personal injury action before the commission, a hearing was held and an award made. In seven hearings on a petition for review which extended over a period of four years, the commission consistently held that the petitioner's physical condition had not changed and the original award stood as ordered. Then in another hearing the commission entered another award stating: "on prior reviews it improperly weighed the evidence herein, and its previous order should be set aside." Upon this change of mind additional compensation was awarded. The Supreme Court of Colorado on a review of the case held that:

> [T]o enter the award above set out upon the simple statement that the evidence had been improperly weighed, and to do so without additional hearings or evidence, and this upon the heels of consistent contrary findings establishes with crystal clearness that the prohibited change of mind occurred without stated reasons.

To allow the second award to rest upon a mere change of mind would have deprived the state of the opportunity to rebut the findings or cross examine the opposing evidence that might have been presented in a proper hearing.

Although the reported law in Colorado is very meager and inadequate for a complete analysis of the subject, it is felt that the courts and administrative agencies of Colorado will follow the trend of the federal and state agencies in other jurisdictions and continue to protect the right of cross examination and rebuttal in proceedings before them. For an analysis of the situation in the various states, see an article in the Minnesota Law Review,[9] and also one in the Harvard Law Review.[10]

In a case before the Federal Communications Commission [11] which involved the issuance of a license to a broadcasting station in competition with one already existing, the question of the admissibility of hearsay testimony was involved. The hearsay evidence admitted consisted of the testimony of the applicant as to

[8] Allen v. Gadbois, 100 Colo. 141, 66 P. 2d 331.

[9] Hoyt, *Some Practical Problems Met in the Trial of Cases Before Administrative Tribunals*, 25 Minn. L. Rev. 545 (1941).

[10] Ross, *Rules of Evidence Before Commissions*, 36 Harv. L. Rev. 263 (1922-23).

[11] Tri-State Broadcasting Co. v. F. C. C., 68.

his talks with a large number of people who told him that another station would be very beneficial and that they would support it financially. The court held that while the commission was not limited to the strict rules of evidence, the admission of the hearsay testimony in question was improper because it deprived the opposing party of the right to cross examine those persons whose composite views the applicant was reflecting into the record.

With regard to the admissibility of hearsay evidence under the rules of commissions which do not follow statutory or common law rules of evidence and procedure, it would seem that if the parties are given the opportunity to cross examine and to present evidence in rebuttal, the requirements of a fair trial have been satisfied.[12]

What Constitutes Denial of Right?

The right to cross examine an opposing witness is a substantial part of the guaranty of a fair trial. The general theory of what constitutes an infringement of one's rights is clear. The agency is not permitted to accept as evidence anything which is devoid of evidential value, and the party concerned must be given a fair opportunity to demonstrate the unreliability of the proffered proof. The general test is well phrased in the Federal Administrative Procedure Act of 1946 [13] (in case of certain proceedings before federal agencies), where recognition is given to the right "to conduct such cross examination as may be required for a full and true disclosure of the facts."

If a letter, affidavit, or report is admitted as a substitute for the oral testimony of an individual witness as to what he has seen or believes, the other party must be given the opportunity to cross examine the author.[14]

Similarly where the only means of attacking the accuracy of the proffered testimony is by cross examination of the author, that opportunity must be offered.[15] Again where the credibility of the author is in issue, the opportunity of cross examination must be afforded.

Where the testimony relates to specific factual disputes at issue in a particular case, cross examination is more generally insisted upon than in cases where the testimony relates to matters of general information. Where an agency desires to rely on reports filed by a large number of disinterested parties, gathered in the course of a general investigation; the rights intended to be protected by cross examination can ordinarily be safeguarded so long as the affected party is given full opportunity to rebut the *prima facie* showing made by the reports. Impracticability of call-

[12] Case Comment, *Crimes—Improper Conduct of Prosecuting Attorneys*, 24 Mich. L. Rev. 834 (1925-26).

[13] Sec. 7 (c).

[14] Bereda Mfg. Co. v. Industrial Board of Ill., 275 Ill. 514, 114 N. E. 275 (1916).

[15] U. S. v. Baltimore & O. Southwestern R. Co., 226 U. S. 14, 33 S. Ct. 5 (1912).

ing a large number of witnesses makes it unwise to insist upon a literal application of the general right of cross examination. In cases where the agency's function is legislative or executive rather than judicial, of course the right of cross examination does not exist.

The Model Act provides that "every party shall have the right of cross examination of witnesses who testify." The Wisconsin act says that "every person shall be afforded adequate opportunity to rebut or offer countervailing evidence." Since the act states that the agencies "shall not be bound by the common law or statutory rules of evidence," it would appear that agencies could allow written evidence to be introduced without cross examination of the author. In Missouri, the Bar Bill authorizes the cross examination of the author of an affidavit, but does not guarantee it.

In North Dakota, the statute provides for the same opportunity to cross examine witnesses "as is permitted to parties in an action in the district court." This seeming assurance of an opportunity for cross examination of authors of written evidence is weakened by the power given to the agency to waive the usual common law or statutory rules of evidence.

In California the problem has been carefully considered. As it now stands, any party proposing to introduce an affidavit in evidence shall so notify the opposing party, who may demand cross examination of the affiant. If not demanded within a specified time, the right of cross examination is waived. Even if the affidavit is not produced for cross examination after request is made, it may still be introduced in evidence, but "shall be given only the same effect as other hearsay testimony." [16]

The conventional objection to hearsay is that it cannot be subjected to cross examination, but that mode of testing evidence generally serves only to reveal the imperfections without exposing the falsehoods of testimony given on direct examination, therefore there is a greater tendency on the part of administrative agencies to allow such evidence to come in than is allowed in the courts.[17]

Formal hearings before the Federal Communications Commission are governed by the rules of evidence which govern civil proceedings in the courts of the United States, but the commission retains the right to relax such rules if, in its discretion, justice will thereby be served. In the administration of radio regulations, this rule seems proper since the trier of facts is expert in deciding the probative force of the evidence presented, and it is therefore capable of exercising a discrimination which the normal jury could not be expected to possess.[18]

Evidence Not Contained in Official Record

The Supreme Court of the United States and the state courts are virtually unanimous in their condemnation of the practice by

[16] 11 Rocky Mt. L. Rev. 545.
[17] Heady, *Administrative Procedure Legislation in the States* (1952).
[18] *Note*, 49 Harv. L. Rev. 1333 (1936).

the administrative tribunals of giving consideration to evidence not contained in the official record to which all parties have access. The Supreme Court of the United States has taken a firm position on this question beginning with the earlier cases coming to it from the Interstate Commerce Commission. In *S. C. C. v. Louisville and Nashville R. Co.*,[19] wherein it was sought to sustain an order of the Commission on the basis of information gathered outside of the hearing, the court said:

> Manifestly, there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute it. . . . All parties must be fully apprised of the evidence submitted or considered and must be given an opportunity to cross examine witnesses and to offer evidence in explanation or rebuttal. In no [other] way can a party maintain its rights or make its defenses.

This language was approved by the Supreme Court of Colorado in *Denver and S. L. R. Co. v. Chicago, B. & Q. R. Co.*[20] Other state courts have consistently taken the same position. The Supreme Court of Illinois, in a railroad case,[21] said:

> The commissioners cannot act on their own information. Their findings must be on evidence presented in the case, with an opportunity to all parties to know of the evidence to be submitted or considered, to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal, and nothing can be treated as evidence which is not introduced as such.

The Supreme Court of Arizona has permitted the commissioners to allow their examiners to make an *ex parte* investigation after a hearing on a Workmen's Compensation case and thus obtain information which the commissioners refused to allow the petitioners to see.[22] The court held that the validity of the commissioners' award against the petitioner was not affected by this practice so long as there was in the official record competent evidence in support of the award. The court stated that "the reports of such special examiners are not themselves evidence, but are merely in the nature of confidential information from which the commission may secure legal and competent evidence." It seems that the court was somewhat confused in this case as to what evidence was.

In an earlier Illinois case, a contrary result was reached when the commission frankly stated that it was unable to determine which way the preponderance of evidence lay and sent out its investigators to obtain *ex parte* affidavits from additional witnesses. The Supreme Court reversed the resulting award, stating that the parties had the right:[23]

---

[19] 227 U. S. 88 (1913).

[20] 64 Colo. 229, 171 P. 74 (1918). See also Comp. L., 1921, ch. 79, sec. 4346.

[21] Atchison, T. & S. F. R. Co. v. Commerce Commission, 335 Ill. 624, N. E. 831, 837 (1921).

[22] Simpkins v. State Banking Dept., 45 Ariz. 186, 42 P. 2d 47.

[23] Bereda Mfg. Co. v. Industrial Board of Ill., *op. cit.*

> . . . not only to present such evidence as they may desire, but also to be present at the taking and hearing of evidence by the opposing party so that each may have opportunity for the cross examination of the other's witnesses.

The courts approve of the use of *ex parte* evidence and expect investigations as long as the rights of cross examination and rebuttal are allowed.[24] In the *Lindsey* case, the court held that such reports as those of the commission's own engineers "are in the nature of evidence and are, like any other evidence, subject to analysis and impeachment, and if an application to examine the report or the authors had been refused, it would be reversible error."

The remedy of the aggrieved party when agencies do take *ex parte* testimony is rather illusory. It is generally held that members of an administrative body cannot be called to the witness stand and be cross examined as to their processes in deciding the case,[25] so that the opportunity of the aggrieved party to bring a suspected violation to the attention of a reviewing court, is really very meager.

An Appraisal of the Right of Cross Examination

The common law considers the examination of an adverse witness so essential to the elucidation of truth that it does not permit offered testimony to be considered as evidence until opportunity has been had for cross examination. Consequently the courts regard the right to cross examine at administrative hearings one to be zealously guarded.[26]

In *Farmers Elevator Co. v. Chicago R. I. & P. Ry. Co.*[27] where the Public Utilities Commission ordered the railroad to make certain connections and where part of the evidence was obtained by *ex parte* investigations, the court said:

> [A]llowing the testimony to be heard by the commission or one of its members without any opportunity to cross examine the witnesses presenting it, amounts to a practical denial of the vital part of the hearing required by this statute. The words 'public hearing' before any tribunal or body, by the accepted definition of lexicographers and courts, mean the right to appear and give evidence, and also the right to hear and examine witnesses whose testimony is presented by opposing parties.

An order of this nature must be based upon the evidence presented in the public hearing, with a full opportunity to cross ex-

---

[24] Saratoga Springs v. Saratoga Gas, Electric Light and Power Co., 191 N. Y. 123, 83 N. E. 693 (1908);
Lucas v. Walters Milling Co., 116 Pa. Super 171, 176 A. 78 (1935);
Lindsey v. Public Utilities Commissioners, 144 N. E. 729, 111 Ohio St. 6 (1924).

[25] Morgan v. U. S., 304 U. S. 1, 18 (1936).

[26] *Note*, 80 U. of Pa. L. Rev. 878, 884 (1932).

[27] 266 Ill. 567, 107 N. E. 841, 843 (1915).

amine the witnesses and to present, if desired, evidence in rebuttal and may not be founded upon *ex parte* examination. "The fundamental right to a fair hearing is determined from the character of the proceedings." [28] It is denied in such cases as permit unsworn testimony, deny cross examination, or promulgate orders on the basis of facts not received in evidence.

Experience in the conduct of all types of procedure indicates the value of cross examination as an aid in separating the gold from the dross of testimony. The adverse party always has a more active interest in narrowing the facts than does the presiding tribunal, and is usually armed with some information not known to the tribunal as an aid in cross examination. To deny this right is to deny fair hearing and to impede rather than assist the agencies in determining facts.

If, in any hearing, rules of evidence are disregarded, they are not necessarily violated. Lawyers usually aid commissions without raising questions of admissibility of evidence and aid tribunals in correctly appraising any kind of evidence received. While cross examination is used for particular purposes, nevertheless it materially aids in the ascertainment of the truth because it brings out the remaining and qualifying circumstances of testimony given on direct examination. "Confrontation and the right to cross examine, explain or refute are necessary." [29]

The Colorado courts have in the past, and should continue in the future to protect the essential rights of cross examination and rebuttal before administrative agencies in order that all the elements of a fair proceeding may be maintained.

COMPARATIVE PROCEDURAL PRACTICES OF COLORADO ADMINISTRATIVE AGENCIES

LEONARD T. HOWARD *
of the Nevada Bar

On the following pages are charts that indicate the number and variety of agencies through which the State of Colorado operates its state government. These charts are not intended to be nor are they a compilation of all state agencies but are rather a study of those agencies that deal directly with the people (external in nature). The state operates many other agencies whose duties are purely of an internal nature and whose only concern is carrying on the functions of government as such. These latter agencies are not herein considered.

Due to the complexity of our state government, it is imperative that many of its necessary functions be delegated to agencies

[28] *The Extent to Which Fact-Finding Boards Should Be Bound By the Rules of Evidence*, 24 A. B. A. 630, 633 (1934).
[29] Gauthier v. Penobscot Chemical Fiber Co., 113 A. 28 (1921).
* Written while a student at the University of Denver College of Law.