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More Old Stuff About Administrative Findings of Fact

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More "Old Stuff" About Administrative Findings of Fact

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So many papers on Administrative Law have been published that a further contribution seems "old stuff," but zeal for the cause of judicial review of administrative findings of fact impels renewal of some argument on that point.

Administrative agencies, state and federal, are multitudinous, and what is the advisable scope of judicial review as to one, or a number of them, may not be so as to others. In a short paper referring to such tribunals as a whole, generalities and dogmatism are unavoidable.

All fact-finders on conflicting evidence are fallible. "Findings of fact" give administrative agencies the occasion, and often the excuse, for the exercise of power over an individual. Such findings may be inaccurate or false. A board with good intentions may unwittingly injure a respondent needlessly. Again, misfeasance and malfeasance in office is encouraged because seldom suspected. Many officials are unduly flattered while countervailing facts are undisclosed or disbelieved. Incompetency, malice or arbitrary conduct of some bureaucrats can be concealed from the general public by the pretense of exercising "discretion." Many men do, or would, abuse authority. That is why we honor the exceptions, and Ingersoll appropriately said: "It is the glory of Lincoln that, having almost absolute power, he never abused it, except upon the side of mercy."

Actualities as indicated by the factual situations and orders in some proceedings, and the possibilities thereby suggested, furnish rational, and inspire emotional, support for a much broader system of review than that involved in the predominant practice of giving finality to administrative findings whenever there is some evidence, however, weak, in their favor.

Many factors contribute to the need of checks upon the fact-finding powers of administrators. The power to make conclusive findings where there is evidence both ways is "of enormous consequence,"[1] and obviously the power may be misused or abused where wielded by officials whose fitness is impaired by unstable tenure, political or group pressure, or the necessity of conducting an investigation as, or from the viewpoint of, a complainant. Where the administrator has acted as prosecutor or in some other capacity incompatible with that of an impartial judge, disqualifying thoughts and emotions enter into the process of arriving at the expressed decision on the facts. Where influential officials or

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[1]Chief Justice Hughes, Feb. 11, 1931; see 17 A. B. A. Journal, 237, 238. *Accord.* Elihu Root, 41 A. B. A. Rep. 355, 369 (1916).

groups manifest a desire for a particular result, the examiner or commissioner may ostensibly become accordant, and find as if he is, though truth and justice would dictate a contrary result. The psychological determinants of his judgment may be opposed to the interests of the humble, weak or inarticulate. While he has no pecuniary interest and apparently is only trying to do his duty, there is nevertheless "a tendency to decide on the basis of matters not before the tribunal or on evidence not produced,"[2] or only on that part of the evidence which supports the wishes of a party or pressure group with whom he is in secret sympathy or fears to offend. Most of the decisions which aggrieve parties are not upon legal questions but upon facts as they exist or are "found" to be.

The "defects of administrative justice"[3] are such that a board may needlessly oppress an economic interest, or unjustly deprive a citizen of the right to carry on his usual occupation, or in some other way burden a respondent, not by the old-fashioned judicial methods which safeguard rights and seek the truth, but by "ignoring the weight of the evidence," or, without familiarity with the evidence, adopting recommendations of prejudiced examiners. Bureaucratic tyranny can best be prevented or discouraged by the right to judicial reexamination of the factual basis of the administrative action, in some cases by an independent commission, but generally by the courts. The latter should be empowered to enforce their own views of the relative weight of the evidence. The prevailing system of giving finality to facts which have some evidence in their support makes false findings also effective if coming within the rule, and that is making the innocent suffer. When, with no right to effective review, an individual is penalized by an order based on findings which untruthfully, possibly libelously, describe his conduct, he, family and friends become embittered against the acting tribunal and others of its class. The memory of any kind of a judicial or administrative lynching tortures its victim for life.

Findings on non-technical evidence.

While administrators or deputies who personally conduct hearings are as qualified as veniremen for ascertaining ultimate facts, still conditions increasing reliability of verdicts are absent with respect to findings. With no challenge, either peremptory or for cause, parties must accept the administrative triers of fact as they find them. A board's personnel is practically unchanging, and hearings tend to become "perfunctory routine,"[4] and there is indifference to exact truth or consequences to individuals. On the other hand, jurors serve for brief periods, and while on duty they bestow undivided and critical attention to the testimony and its givers. They remain separated from persons interested in the result.

[2]1938 Report, Special Committee on Administrative Law, A. B. A., 63 A. B. A. Rep. 331, 347.
[3]Ibid., p. 346.
[4]1938 Report, Sp. Comm. Adms. L., A. B. A.

They must agree without compromise, and upon preponderance of the evidence. The jury is the most dependable discoverer of truth on conflicting evidence, and yet persons with just causes are often so fearful of adverse results before a jury that they avoid any adversary proceeding. Something that hinders accurate fact-finding does get into the jury box, but much is kept out. If even good juries intermittently err, boards will do worse.

If a fact-finding board resembles the equity judge more than it does the jury, the fact remains, as previously pointed out, that the board is apt to have disqualifying attributes which the judge has not, and administrators are often beset by outside influences which would not approach a court. Reasons for the necessity of having the "findings of fact of a trained equity or admiralty judge subject to complete review"[5] apply also to the findings of a commissioner who is "many things that a judge is not, and is not many things that a judge is,"[6] particularly in care to avoid acting upon untested factual assumptions.

Findings on technical evidence.

Where a board deals with matters where it must make expert interpretation of data which are intrinsically uncontroverted, it is in the position of a judge who must find on technical evidence. Reasons for judicial review on the facts still remain, even where the administrator is more expert than the judge. Even a non-expert is capable of criticizing the findings of an expert for the reason, among others, that to test findings already formulated requires less expertness than to originate them. If the reviewing court regards the commission as impartial and expert, the original determination, unless clearly wrong, would be affirmed, and the results of good administrative work preserved. The power to modify or reverse, on the facts, would be rarely exercised, but should exist because its potentialities discourage erroneous, careless or arbitrary action on the part of boards judicially correctible.

Questions still timely as to state boards.

The prevailing practice through the nation is not only to deny a trial *de novo* but also a review on the facts where a party aggrieved by an administrative order takes a statutory appeal or brings certiorari. The courts are compelled to affirm an order, unless questions of law require the contrary, if there is any evidence to support the findings of fact. This permits judicial sloth. Thus a judge without reading the transcript can safely pretend that he has done so and found "substantial" evidence supporting the order complained of. But if, as he is presumed to do and generally does, he actually reads the record, he is then able to say, sincerely, not only whether there is some evidence on the side of the findings, but also whether or not the preponderance or weight is also accordant.

[5]Vanderbilt, 23 A. B. A. J. 871, 873 (1937).
[6]Vanderbilt, 24 A. B. A. J. 267, 271 (1938).

No additional time or labor is required for the determination of that further question. This situation refutes the argument that a review on the facts, as in the equity practice, would unduly burden the court and cause delay. If the honest and diligent judge examines the whole record carefully to decide legal questions, including those requiring some familiarity with the evidence, his court should not be paralyzed to reverse on discovery of an injustice scantily clad in contradicted evidence. Yet there is legislation thus limiting the power of reviewing courts. The "little Wagner acts," for example, contain the provision that "the findings of the board as to the facts, if supported by evidence, shall be conclusive."[7]

Where a state agency determines issues of fact arising between two private parties, as in Workmen's Compensation cases, there is some excuse for giving finality to the administrative findings, but not so where the agency itself or a pressure group is assailing or investigating an individual. In such cases horse sense perceives, and dictates keeping or securing, the advantages which individuals have in a system whereby determinations of issues of fact as well as of law are made, if not initially at least finally, by an independent and specially qualified tribunal, restricted to adjudicating (not also investigating) functions. That system tends to insure fairness and conformity to the truth.

With respect to some state agencies, trials *de novo* ought to be available, as illustrated by a North Carolina case where a physician whose license was revoked could appeal to a court and have a jury trial.[8] In Washington such physician could have a trial *de novo* to the court.[9] Ordinarily, however, only a review on the facts is enough. It is not impractical. There is, or was, a statute in New York under which an assessment for taxation could be contested on the ground of overvaluation, and testimony taken by a reviewing court.[10] Statutory certiorari or other kind of review can empower a court to pass upon the weight of the evidence.[11]

To foster administrative absolutism by retaining and enacting statutes which give finality to findings of boards is to weaken appreciation, and imperil possession, of constitutional liberties which only the courts steadfastly guard, and these tribunals are crippled by the statutes in question. Sponsors of such statutes do not contemplate this situation, but desire only that their pet boards have as much power as possible. The writing of some theorists, professors, and bureaucrats favor limitation of judicial control, assuming that commissioners are always impartial and expert. Hence the bar must remain the chief defender and preserver of adequate judicial review, and thereby of the constitutional system and rights which such review protects.

[7]See section 11 (f), Chapter 55, Laws of Utah (1937).
[8]Board v. Carroll, 138 S. E. 339.
[9]Board v. Macy, 159 Pac. 801.
[10]Freund, Administrative Powers, etc., 269.
[11]Peo. v. Gibbons, 231 N. Y. 171.

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September 29.....Meeting Colorado Junior Bar Conference
January, 1941.....Annual Meeting Colorado Association of District Attorneys