Cornell Law Review

Volume 28
Issue 1 *November 1942*

Article 4

Benjamin Report on Administrative Adjudication

Henry S. Fraser

THE BENJAMIN REPORT ON ADMINISTRATIVE ADJUDICATION

HENRY S. FRASER

The able and comprehensive report of Commissioner Robert M. Benjamin to the Governor of the State of New York, submitted in March, 1942, on the subject of administrative adjudication in that State, is the result of a three-year study by the Commissioner and his staff. Although the investigation was directed to conditions in New York State, the report is replete in its 369 pages with illustrations and conclusions of universal significance in the field of administrative law. Nor does the existence of the war detract from the importance of this report—indeed, the effective and just conduct of representative government is perhaps even more vital in wartime, and it is one of the ideals we now seek to preserve.

The report is of more than usual interest to the general practitioner. It is not concerned with the minutiae of procedure before a particular administrative board, and therefore of interest chiefly to a specialist; rather, the report delves into the difficulties common to the nature of all administrative process, and contains profound and at the same time practical analysis of present abuses, with suggestions for reform. Every lawyer, whether or not he appears regularly before one or more commissions or boards, should be deeply concerned with the trend in modern days toward administrative government in fields that involve the operation of discretion and of adjudicatory technique. These matters touch to the heart the ideals and standards cherished especially by the legal profession.

Put in its most general terms, the report is concerned with "the problem of reconciling, in the field of administrative action, democratic safeguards and standards of fair play with the effective conduct of government." Commissioner Benjamin accepts as necessary the enlarging area occupied by administrative action "if government is to be effective in the expanding fields of social and economic legislation in which its intervention is thought desirable." Therefore he has not undertaken to judge the desirability of the existing substantive provisions of law which govern particular fields of administrative activity, but has limited himself to procedural aspects.

The Commissioner wisely has observed that more can be accomplished in the direction of ideal procedures through voluntary improvement by the administrative agencies themselves, than can be achieved by legislation, necessary as the latter may be in some instances. "Many of the intangible aspects of administrative procedure, such as the proper attitude of the administrator

towards the proceeding and the parties before him, are in their nature incapable of legislative control."[1]

But, says Mr. Benjamin, not only the attitude of the administrator, but the form of the procedures themselves should be such as to result in a confidence on the part of the citizen that he is being fairly dealt with. "In appraising procedures and suggesting change, the objective should not be mere conformity with the due process clause of the Constitution. Many forms of procedure are consistent with due process, and the most satisfactory may call for much more than due process alone would require." And, holds the Commissioner, the existence of judicial review, even if broader in scope than currently the case, is not the real cure for the improper conduct of a hearing or for the unfair decision of a board. The judicial correction of the result does not eliminate the expense and delay; nor should it be forgotten that those who have frequent dealings with an agency are often loath to summon that agency to the bar of a court. "The fear of retaliation is, I believe, rarely justified, but there is no doubt that the reluctance exists." Thus, many a present injustice may be tolerated rather than run the risk of future and perhaps greater injury inflicted as the aftermath of court proceedings.

Quasi-judicial Procedure

The Place of Policy

Mr. Benjamin is of the view that an administrator's concern with the policy of the statute which he applies does not disqualify him for unbiased adjudication. For example, the interpretation of the statute by the administrator may call for consideration of policy; or the determination of the penalty to be imposed for a particular offense may require a discretion guided by policy. "But," Mr. Benjamin maintains, "policy should play no part in the decision of questions of fact; policy, rightly understood, cannot call for the decision of a question of fact in a particular way."

Thus, whether a liquor manufacturer has violated a statute should be determined as a fact wholly apart from any consideration of policy; but policy may come into play in determining the penalty, although, even here, the policy should be applied with fair-minded deliberation. Indeed, says the Commissioner, fair adjudication is itself a fundamental part of policy, and

[1]How true this is! To the writer of the present article it appears futile to seek by statute to instill a passion for due process of law and for the constitutional protection of every person in the land. Such a passion nourishes the soul only of him who, regardless of phrases in the laws, loves the liberty of his neighbor equally with his own. If this passion is rarely witnessed today, it is not because it has never existed in the history of the United States. The Constitution itself, however it may be tortured today by determined administrator or court, is proof of the fact that such love has animated statesmen of a former time.

the particular object of a given statute will be furthered in the long run by impartial decisions of fact and by the agency's reputation for unbiased judgment.

In this connection Mr. Benjamin makes one highly important point, namely, that the subordinate personnel of an agency should not labor under a misapprehension of the attitude of the head of the agency. It is not uncommon that a subordinate assumes that his own future success depends upon the rendering of decisions of fact according to fixed views of the head of the agency, whenever the evidence gives the slightest excuse for such a result. "It is of the first importance, therefore, that the top administrative personnel make clear to their subordinates that what is expected of them is not a record of 'results,' but fair adjudication whatever the result of such adjudication may be."

Separation of Functions

The report holds that the problem of the separation of functions involved in quasi-judicial action cannot be solved by the mechanical application of general principles. On the one hand are the considerations that are generalized into the constitutional doctrine of the separation of powers. On the other hand are the considerations making for effectiveness in carrying out the policies that have been confided to the agency. In each case, the solution depends upon a wise balancing of these and other considerations in the particular circumstances.

One of the most important reforms in this regard recommended by Mr. Benjamin concerns the State Labor Relations Board. The grounds of his recommendations, however, go far beyond this particular Board and have application to numerous administrative agencies both federal and state. The report recommends that, in place of the present unitary board exercising investigatory, prosecuting, and adjudicatory powers, there be established two boards, independent of each other and each consisting of three members appointed by the Governor, by and with the advice and consent of the Senate, and removable by the Governor for cause. There would also be corresponding terms of office for members of the two boards, so that the boards would be made up, in the same proportions, of appointees of the same appointing power.

One of the new boards would adjudicate unfair labor practice cases, and also in representation cases would adjudicate to the extent necessary to determine facts (including the adjudication of objections to the conduct of elections of bargaining representatives). The other board would exercise all other functions, including the investigation of charges of unfair labor prac-

tices and of controversies concerning the representation of employees; the determination whether to issue complaints, and the issuance thereof; the litigation of unfair labor practice cases before the other board; the presentation of evidence at hearings in representation cases; the conduct of elections; and the litigation of all enforcement and other proceedings in court. Each board would have separate personnel and staff, and would make its own rules and regulations within the sphere of its authority.

The principal objection heard by Mr. Benjamin against the proposed separation of functions is that it would unduly impair administrative responsibility and effectiveness. To be sure, he points out, this objection has cogency when applied to agencies such as the Public Service Commission and the Insurance Department which are charged with the continuing regulation of a field of industrial or business activity. But the machinery set up by the Labor Relations Act is different and is essentially the machinery of litigation and adjudication. On the basis of testimony taken at formal hearings, and upon issues framed by pleadings, the Labor Relations Board determines whether the Act has been violated by an employer. The Board may then order the employer to cease and desist, and in certain instances orders affirmative action in the form of reinstatement of employees with back pay. In representation cases the Board's functions are still essentially adjudicatory, except in the case of the mechanical conduct of elections.

The basic consideration in favor of a separation of functions, Commissioner Benjamin finds, is that their present combination "creates, if not actual prejudgment and bias in adjudication, at least the appearance of prejudgment and bias." The present union of powers has its effect both on the informal and the formal procedures of the Board. Thus, when an informal settlement of the issues is attempted prior to hearing, inevitable pressure, whether voiced or not, is felt by the employer who fears that if not adjusted to the Board's liking the case will be later decided adversely. A settlement reached in such an atmosphere is tainted with the duress inherent in the existing method and can scarcely promote genuine industrial peace.

The formal procedures of the Labor Relations Board are also today less effective than need be. For example, an employer can have little confidence that the litigated issues will be wholly free from prejudgment when the member of the Board who authorized the issuance of the complaint participates in the decision of the case. Even if this member were free from any bias, the employer would rarely so believe. This undesirable situation would be largely cured by the adoption of Mr. Benjamin's recommendation to separate the functions. Likewise eliminated would be the present spectacle of a Board attorney prosecuting the employer who is on trial before an examiner

of the same Board. Such a situation, whatever explanations may be offered, causes the employer to believe that the proceedings are formalistic only. Unless the employer and the employee both have confidence in the fairness of the proceedings, any decision by the Board will not be accepted with the sportsmanlike willingness that must exist if harmony is to prevail in American factories.

On the other hand, the Commissioner is not of the opinion that unitary boards should always be dichotomized when adjudication is involved. For instance, the Public Service Commission, in fixing rates, conducts hearings resembling court proceedings. However, these hearings are not, as is true of those of the Labor Relations Board, directed primarily to the determination of justiciable questions of fact or law; rather, rate-fixing procedure is fundamentally legislative in nature and hence the Public Service Commission's hearings are basically for the purpose of "providing the foundation for what is in the end an exercise by the Commission of an informed judgment as to the future effect of action that it may require or prohibit."

Opportunity to be Heard

In what instances, where person or property is to be affected by administrative action, should the party be given an opportunity to be heard? The first reaction of a lawyer would be to favor a hearing in every case. However, Commissioner Benjamin finds the question complex, with problems of due process and of policy present, and he concludes that no general answer may be given. Due process, he points out, does not always require a hearing. For example, an ordinance may validly authorize a health officer to quarantine, without a hearing, persons reasonably believed by him to bave been exposed to smallpox.[2] Moreover, in certain contingencies, the Superintendent of Banks may summarily take possession of the business and property of a bank.[3] However, the bank may apply within ten days for an injunction,[4] but this remedy, Mr. Benjamin states, has been sought rarely, and never with success.

Although due process may not require a hearing in a given case, or may require only a limited type of hearing, nevertheless sound policy may dictate that government grant more than due process demands. "Fairness will generally require that, to the greatest practicable extent, there should be accorded to a party an opportunity to know the reasons for proposed administrative action and the assumed facts that support those reasons, an oppor-

[2]Crayton v. Larabee, 220 N. Y. 493, 116 N. E. 355 (1917).
[3]N. Y. BANKING LAW § 606.
[4]*Ibid.*, § 607.

tunity to test and to controvert those reasons and those facts, and an opportunity to present and explain his own position before action is taken. Procedure that denies or substantially limits such opportunities must be justified by cogent considerations."

The question of whether or not a hearing should be granted becomes acute in the field of the issuance, suspension, or revocation of an occupational or professional license. In Mr. Benjamin's judgment, hearings in the field of the issuance of licenses are not required as a matter of due process.[5] Moreover, the interest of an applicant for a license is ordinarily not so great as the interest of him whose license it is proposed to revoke or suspend. Denial of an application ordinarily effects no immediate change in the applicant's status, whereas the opposite is true in cases of revocation or suspension. Then, too, in the case of certain types of licenses, a written examination to test the applicant's knowledge, or an analysis of his books to determine the adequacy of his financial resources, may suffice. On the other hand, if the issuance of a license is conditioned upon the good character of the applicant, and that is questioned, a hearing procedure "is clearly appropriate."

More forceful reasons exist in favor of a hearing in the case of a proposed revocation of an occupational or a professional license. Mr. Benjamin feels that "strong reasons must be adduced to justify the denial of a hearing before the revocation of any kind of occupational license." He further believes that in such case the right to a hearing should be expressly accorded by statute. Furthermore, pending a hearing to revoke a license, the licensee's privileges should not be suspended, except on very limited occasions, without a previous hearing. Where license suspension is used merely as a disciplinary proceeding, an opportunity to be heard should always be accorded, says Mr. Benjamin.

Representation of Parties at Hearing

The Commissioner holds that the right to be represented by counsel is legally assured where the right to a hearing is accorded by statute or is required by due process of law; and, in any event, the right to counsel should be recognized as a matter of policy. This recognition he finds to be the existing practice.[6] However, the Commissioner declares, the right to be represented

[5]He states that in view of the remedy available by a judicial proceeding in the nature of mandamus, the dictum to the contrary in Bratton v. Chandler, 260 U. S. 110, 43 Sup. Ct. 43 (1922), would probably not be followed in a case arising in New York.

[6]It is not, however, the universal practice in the federal jurisdiction. Thus, the SELECTIVE SERVICE REGULATIONS, § 625.2 provide that: "No registrant may be represented before the local board by an attorney." Attorneys are also barred from representing a registrant before an appeal board (see official *Bulletin of Information for Persons Registered*, Form 5), although there does not appear to be any Regulation on this score. The abuse arising from the present denial of the right to counsel has been pointed out by Judge Mandelbaum in United States *ex rel.* Dick v. Joseph, decided by the District Court for the Southern

does not necessarily include a right to select any representative whom the party may choose.

It is generally recognized, claims Mr. Benjamin, that an administrative agency has power, even in the absence of specific statutory authorization, to restrict practice before it, whether by lawyers or laymen, to such as may qualify, in character, training, and knowledge, for practice in its particular field. Mr. Benjamin adds that this power may be exercised by control over original admission to practice, or by preclusion from further practice. So far as lawyers are concerned, he states, no administrative agency in New York seeks to impose any standards of its own for admission to practice; nor, so far as his observation disclosed, does any agency in the State undertake by its own action to preclude a lawyer from further practice before it, or otherwise to discipline him. "This is as I think it should be."[7]

Mr. Benjamin does not believe that the possibility that some lawyer at some time might, in the opinion of the hearing officer, be guilty of "contemptuous" conduct, warrants the conferring of power upon the hearing officer to discipline the lawyer. "The possibility of abuse of such power, remote though it might be, and the fear of such abuse which the existence of the power would arouse, in my view clearly outweigh the advantages that might be gained in administrative efficiency; and the fact that the problem rarely arises is an added argument against such a solution." The proper solution, the Commissioner recommends, is to enact a statute authorizing application to a court to punish for contemptuous conduct in an administrative proceeding any person, including counsel. The mere availability of such procedure, he believes, would normally make actual resort to it unnecessary, and, whatever the shortcomings of the court procedure, "it is in my judgment still clearly to be preferred to a procedure that would vest additional powers of compulsion in the agency itself."

Practice by lay representatives raises other problems. Mr. Benjamin concludes that the point at which practice before administrative agencies becomes

District of New York on May 9, 1942. More recently the conviction of a lawyer, who was alleged to have accepted a fee upon the understanding that he would obtain the deferment of a registrant, evoked the extraordinary statement from Col. Arthur V. McDermott, director of Selective Service in New York City, that the public would now "realize the futility of paying a fee to a lawyer for representing a registrant before a local board. . . . The Selective Service system insures so many safeguards for the protection of registrants and their dependents that no lawyer is necessary in any event." *American Law and Lawyers*, Oct. 31, 1942.

[7]The situation, however, is not so happy in the case of all federal boards and bureaus. For example, the Regulations of the National Labor Relations Board (Art. II, Section 31, Series 2) provide that: "Contemptuous conduct at any hearing before a Trial Examiner or before the Board shall be ground for exclusion from the hearing." The Board has held that this Regulation applies to lawyers as well as laymen, and has exercised its authority accordingly. Matter of Weirton Steel Company, 8 N. L. R. B. 581 (1938).

"the practice of law", and therefore prohibited to laymen,[8] cannot be clearly ascertained from the decided cases. He thinks that definition of the practice of law must be left to further judicial decisions, and he points out that representation by laymen does not present a problem of any magnitude in most of the administrative agencies of the State. He admits, however, that in a few instances lay practice is considerable. Thus, statutory authorization is given for lay representation in workmen's compensation and unemployment insurance cases. Moreover, in certain other fields there are instances of lay practice not specifically authorized by statute. For example, certified public accountants frequently appear before the Income Tax Bureau and the Corporation Tax Bureau; and, in proceedings before the State Labor Relations Board, unions are not infrequently represented by their business agents.[9]

In the Commissioner's view, the question of lay practice resolves itself into the problem of the extent to which the parties to an administrative proceeding ought to be restricted in their free choice of representatives "for their own protection against improper or inadequate representation, and for the protection of the agencies themselves against the incompetent or improper presentation of matters before them." The Commissioner holds that the answers to the problem will vary in different fields. "In some fields the answer will be to prohibit lay practice altogether; in others, to permit lay practice in certain types of proceeding but not in all, or by certain kinds of laymen but not by all; in still others, to permit lay practice without such specific limitations. Where lay practice is permitted, it will generally be desirable to impose requirements of character and capacity for admission to practice, and to provide for disbarment and other disciplinary controls over those who are admitted."

The problem of lay practice, states Mr. Benjamin, is too complex to be solved summarily. He thinks that in some instances lay representation should be permitted, and he does not agree with the suggestion, sometimes made, that there should be a general statutory prohibition against lay practice. Nor does he agree with an alternative suggestion that lay practice be prohibited where a proceeding involves the decision of questions of law, or where it involves the preparation of a record which may be the basis for judicial review. Either of these tests, he says, would exclude lay representation almost entirely, and therefore exclude it in some situations where he believes

[8]N. Y. PENAL LAW. Art. 24.

[9]In a recent case the State Labor Relations Board unanimously overruled an employer's objection to a union appearing by a lay business agent. The union official cross-examined the employer's witness, introduced exhibits, conducted direct examination of witnesses for the union, and performed all other functions, however inexpertly, that a lawyer would perform. Matter of W. H. H. Chamberlin, Inc., N. Y. S. L. R. B., April 21, 1942.

it not undesirable. Of course, as Mr. Benjamin points out, no administrative agency can authorize by its rules what would otherwise be unlawful practice of the law.

Evidence

Administrative problems in respect of evidence relate principally to questions of: (a) admissibility, and (b) the kind of evidence necessary to support a determination.

Mr. Benjamin is of the opinion that the present rule, whereby the mere admission of evidence that would be excluded in a court does not vitiate the proceeding, is clearly desirable. In defense of this opinion he adduces several reasons. First, the law of evidence is "unsystematized, difficult to understand in detail, and difficult to apply." Hence, under a strict rule, confusion would be worse confounded where the hearing officer is not a lawyer or where the parties are not represented by lawyers. But even if the hearing officer were an expert in the law of evidence, Mr. Benjamin believes the present practice should obtain, because the exclusion of evidence, whose actual probative value could be appraised with reasonable accuracy, "is far more likely to lead to the wrong result than the admission of such evidence would be." "A trained hearing officer's experience, and his familiarity with the particular field of inquiry, should often enable him to appraise more accurately the weight properly to be accorded to such evidence than could a jury or even a judge unfamiliar with the field of litigation."

In the second place, emphasizes the Commissioner, the speed with which it is often imperative to bring on quasi-judicial proceedings, and the frequently long distance from the scene of events to the place of hearing, make it difficult to prepare for trial in the manner customary in court proceedings. Thus, as a practical matter, it is often necessary to be satisfied in an administrative proceeding with something less than the theoretically best evidence.

In the next place, in some types of quasi-judicial hearings (*e.g.*, application for a certificate of public convenience for an omnibus line, or an application for a liquor license) it is desirable, says the Commissioner, to permit members of the public to express their views freely. The weight to be accorded to such testimony can safely, he believes, be left to the board.

Finally, the application of the exclusionary rules to proof by an agency of matters within the scope of its own expert knowledge would, Mr. Benjamin maintains, frequently cause great delay, sometimes to the point of defeating effective action.

The other principal problem in the field of evidence has to do with the kind of evidence which is required to support the decision. Between the "legal residuum" rule, established under that name in 1916 in *Matter of Carroll*

v. Knickerbocker Ice Co.,[10] and the "substantial evidence" rule, developed in the federal jurisdiction, Mr. Benjamin prefers the latter. As a matter of fact, the modern trend in New York, he finds, is to relax the "legal residuum" rule even in the field of hearsay,[11] and thus to approach the "substantial evidence" rule.

This is not to say, however, that Mr. Benjamin believes that a reviewing court should countenance any conceivable supporting evidence. On the contrary, Mr. Benjamin states that a reviewing court should apply some standard to determine the qualitative sufficiency of the evidence. The freedom of administrative tribunals to accept evidence without regard to the exclusionary rules that control in judicial proceedings requires a safeguard against abuse. Such a safeguard Mr. Benjamin believes available in a wise application of the "substantial evidence" rule, which type of evidence has been described by Judge Learned Hand as that "on which responsible persons are accustomed to rely in serious affairs."[12]

The most important charge that Mr. Benjamin levels against the "legal residuum" rule is that it "iguores the circumstance that the residuum of legal evidence which is required to support a finding may in fact have played little or no part in the actual decision under review,—that that decision may in fact have been based largely or wholly on other logically probative but technically incompetent evidence." Furthermore, says the Commissioner, the attempt to divide questions of qualitative sufficiency and quantitative sufficiency is artificial because the two questions are in a real sense one, and ought to be determined together. "This the substantial evidence rule permits, where the legal residuum rule does not."

Decision

On the subject of decisions made by administrative boards, Mr. Benjamin states that in the entire quasi-judicial realm the process of decision "is of paramount importance." "Unless the administrator approaches the decision impartially, with an intention to decide the case on the merits, and unless the procedure for decision is adapted to reaching the correct result, all that has been sought to be accomplished by proper procedure in the earlier stages of the quasi-judicial proceeding is likely to be lost."

The fact that the statute may free the board from control by the legal exclusionary rules of evidence imposes a corresponding obligation upon the administrative judge to appraise properly the quality of the evidence and the

[10]218 N. Y. 435, 113 N. E. 507 (1916).
[11]*Citing* Matter of Heaney v. McGoldrick, 286 N. Y. 38, 35 N. E. (2d) 641 (1941).
[12]National Labor Relations Board v. Remington Rand, Inc., 94 F. (2d) 862, 873 (C. C. A. 2d 1938).

weight to be accorded to it. Moreover, if judicial review of factual findings is to be limited (and Mr. Benjamin, as will appear hereafter, thinks it should be), such limitation must be on the assumption that the administrative judge will determine the case on his own deliberate judgment as to the preponderance of the evidence, unaffected by other considerations—"that he will not look for evidence which will sustain on judicial review a decision actually reached on other grounds."[13]

The primary question of method is how the deciding officer is to become acquainted with the evidence and the arguments of the parties. Of course, if the sole deciding officer presides at the hearing, no difficulty on this score arises. But often the hearing officer is not the deciding officer, or he is only one member of a board that is to pass on the issues. Mr. Benjamin recognizes in his report that there exists no method by which a deciding officer who has not been at a hearing can be as fully informed as if he had. But practical considerations of fiscal policy and human physical limitations frequently make it impossible for the deciding authority either to be present at all hearings or even to have a detailed knowledge of all evidence taken at every hearing. In such situations the deciding authority must largely rely on reports by the hearing officers, and also, in many instances, on the assistance of a staff whose task is to marshal and digest the evidence for the consideration of the deciding authority.

The ideal system of staff assistance, Mr. Benjamin maintains, would be modeled on that by which a judge uses the services of a law secretary. Thus, the aid of the administrative staff would not be partisan in nature and would be limited to legal research as far as possible. Such research "involves less danger than assistance on questions of fact or of the exercise of discretion." Furthermore, "it is important to the quality of the assistant's work that he should have full access to all the materials of decision and should be instructed to use them all,—for example, that he should not summarize the evidence in the record without also hearing whatever argument is made and reading whatever briefs are filed. It is important, again, that the assistant should be instructed to confine himself to matters in the record; otherwise, without the knowledge of the deciding officer, matter not in the record may reach him in that way."[14]

[13]Nothing is so exasperating to a practicing lawyer as the ingenious combing of the record by the deciding officer in a strained and tenacious effort to build up a decision against the party affected, no matter what twists are necessary and with utter disregard of a body of contrary evidence sufficient to convince any jury or judge of a court. The former Chief Justice Hughes, on one occasion in addressing the American Law Institute, referred to this vicious practice as "a mere sorting of facts to suit a preconception of policy." 26 A. B. A. J. 473 (1940).

[14]Commissioner Benjamin is of the opinion that an administrative adjudication is valid

JUDICIAL REVIEW

Commissioner Benjamin states in his report[15] that the subject of judicial review lay at the foundation of his appointment to make the present report. And, in truth, the importance of the problems implicit in the judicial review of administrative decisions can scarcely be overestimated. The impact of administrative adjudication in late years has evoked much thought on the principles of constitutional government. By the hands of the enemies of our inherited form of government, the instruments of the administrative method have been eagerly grasped as tools with which to dig under the citadel. The danger is increased by the continuing necessity under modern conditions to employ administrative methods in dealing with certain areas of human activity. It is obvious that the courts cannot assume the burden of administering the laws either directly or by means of wholesale judicial review. The solution of the dilemma is first, to publicize such an impartial and able report as that made by Commissioner Benjamin; second, to see to it that sound reforms are made by those in political authority; and third, by example and courage to instill in our fellows and our children a love of fair play.

Quasi-judicial Determinations of Fact

Mr. Benjamin interprets the decisions of the Court of Appeals to hold that the scope of review of factual determinations is the same whatever the language of the particular review statute, and that, in practice, the quantitative sufficiency of evidence is to be tested by the "substantial evidence" rule. Citing *Matter of Stork Restaurant, Inc. v. Boland*,[16] Mr. Benjamin concludes that the substantial evidence test "is thus a test of the rationality of a quasi-judicial determination, taking into account all the evidence on both sides." With this state of the law, Mr. Benjamin is in accord.

No form of review, however broad, he maintains, could ascertain with certainty whether the board had actually arrived at its determination after an honest and considered judgment as to the preponderance of the evidence. "Adherence by the administrative tribunal to that standard of responsible adjudication must necessarily be left to the good faith of the tribunal."

in New York although the deciding officer relies entirely on a report or memorandum of another officer or employee. Matter of Elite Dairy Products v. Ten Eyck, 271 N. Y. 488, 3 N. E. (2d) 606 (1936). Mr. Benjamin considers the subsequent holding of the Appellate Division in Matter of Joyce v. Bruckman, 257 App. Div. 795, 15 N. Y. S. (2d) 679 (4th Dep't 1939), to be of doubtful authority. He also believes that the well-known *Morgan* cases in the Supreme Court of the United States are not of binding effect on the courts of New York because the *Morgan* cases, he argues, were decided not on the ground of due process but on the ground of statutory construction of the provision for a "full hearing" in the statute there considered.

[15]At p. 326.

[16]282 N. Y. 256, 26 N. E. (2d) 247 (1940).

Judicial review as to the rationality of the decision below, *i.e.*, whether other persons might reasonably make the same choice on the record, is broad enough, he states, and will "enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication." A review wider in scope would, in Mr. Benjamin's opinion, permit the court to substitute its own judgment on the evidence for that of the board, even where the board's determination did represent its considered judgment.

Although one might at first blush think, says Mr. Benjamin, that a better test would be that by which the court sets aside a jury verdict as against the weight of evidence (even when there may be substantial evidence to support the verdict), a fundamental difference between administrative and judicial procedure militates against such test. When a jury verdict is set aside and a new trial ordered, the new trial is held before a different jury, unaware of the appellate court's decision; and if enough juries reach the same verdict it is ultimately permitted to stand. On the other hand, the same administrative board must reconsider the same case. Unless the board were actually persuaded that its original decision should have been otherwise, the outcome would be that the court's judgment on the preponderance of evidence would prevail over the board's. This, Mr. Benjamin believes, would be unwise, not solely because of the presumed expertness of the board, but because the whole process of administrative adjudication would be unduly impeded and the courts unduly burdened by a host of appeals.

Quasi-judicial Determinations as to Exercise of Discretion

In some instances the administrative tribunal, after finding the facts, must exercise a choice as to the action to be taken. In exercising its discretion the board has, under the decisions of the Court of Appeals, a wide range limited only by the requirement that its action be not arbitrary or capricious. The reviewing court may not substitute its own judgment of what is reasonable and may not reverse merely because it feels that the board's order was unwise or inexpedient.

It is thus clear, says the Commissioner in his report, that the courts of New York, as in their review of administrative determinations of fact, have tested the exercise of discretion by the touchstone of rationality. Mr. Benjamin believes this to be the right test.

Quasi-judicial Determinations of Law

Agreement is general that administrative determinations of law are subject to complete review by the courts. The principal difficulty arises as to what is a determination of law. A board may hold that a certain railroad is "inter-

urban" and, as such, is excepted from the operation of a statute. And the reviewing court may affirm on the theory that the determination was factual, since the legislative authority had not clarified or defined the term.[17] On the other hand, whether a workmen's compensation injury occurred "in the course of employment," may be deemed a question of law and hence subject to full review.[18]

The report concludes with the Commissioner's statement that it is his judgment that New York State "can take merited satisfaction" in its system of administrative adjudication. "That there is room for improvement in many respects should not detract from that satisfaction, in view of the difficulty of the problems to be met." Mr. Benjamin points out that the greater part of his study and report was completed before the outbreak of the present war in December, 1941. Although he recognizes that the State must now be concerned primarily with matters directly affecting the prosecution of the war, he is of the firm opinion that the present emergency only serves to emphasize the importance of solving problems that concern the effective conduct of government under democratic standards. "If a full solution must be deferred, it will be all the more important, when the emergency is over, to have made a start towards the solution, and to have laid out the lines of further progress. It would in any event be impossible to solve at once all the problems with which this report has dealt. What is most important is that development should be in the right direction. Despite the emergency, much of what I have suggested could be put into effect forthwith, and with little or no additional expense. It is my hope, therefore, that this report may serve as the basis for some immediate action, and as a framework for the future development of administrative law in this State."

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[17]Shields v. Utah Idaho R. Co., 305 U. S. 177, 59 Sup. Ct. 160 (1938).
[18]Matter of Johnson v. Smith, 263 N. Y. 10, 188 N. E. 140 (1933).